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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

GRAFF PAY-PER-VIEW, INC.,

Appellant,

—v.—

JANET RENO, ATTORNEY GENERAL; THE UNITED STATES OF AMERICA; THE UNITED STATES DEPARTMENT OF JUSTICE; AND THE FEDERAL COMMUNICATIONS COMMISSION,

Appellees.

ON APPEAL FROM A THREE-JUSTICE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Does section 505 of the Communications Decency Act of 1996, which regulates "indecent" and "sexually explicit adult" programming on selected cable television channels by requiring most cable systems either to make economically unjustifiable technological upgrades or to "not provide" adult pay-per-view programming except during an 8-hour period beginning at 10:00 p.m., and which would substantially diminish the adult viewership of such programming, violate the First Amendment?

2. By regulating "sexually explicit adult programming" and "indecent" programming on a handful of targeted cable television channels while leaving other cable channels and other communications media entering the home free to transmit the same or comparable programming, does section 505 violate the First and Fifth Amendments?

3. Does section 505 violate the First Amendment because it subjects protected speech to unconstitutionally vague regulations?

LIST OF PARTIES AND RULE 29.1 STATEMENT

In addition to the parties listed on the cover, Playboy Entertainment Group Inc. ("Playboy") is nominally an appellee. Playboy's interests are aligned with those of Graff Pay-Per-View Inc. ("Graff"), and Graff's suit challenging section 505 in the District Court was consolidated with Playboy's for hearing and decision. Playboy has filed a jurisdictional statement, No. 96-1034.

Graff has no parent company and no subsidiaries that are not wholly-owned. Effective December 2, 1996, Graff's corporate name was changed to Spice Entertainment Companies, Inc.

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ON APPEAL FROM A THREE-JUDGE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

JURISDICTIONAL STATEMENT

Appellant Graff Pay-Per-View Inc. ("Graff") respectfully submits this jurisdictional statement to docket its appeal from the November 8, 1996 order of a three-judge district court denying Graff's motion for a preliminary injunction to restrain the implementation and enforcement of section 505 of the Communications Decency Act of 1996.

OPINIONS BELOW

The opinion and order of the three-judge court denying Graff's motion for a preliminary injunction are published at 1996 U.S. Dist. LEXIS 17000 (D. Del. November 8, 1996), and reprinted in the appendix *infra* ("JS App.") at 2a and 3a.

The opinion granting a temporary restraining order is published at 918 F. Supp. 813 and reprinted below at 48a. The TRO is reprinted at 46a.

The subsequent order of December 5, 1996, granting plaintiffs' motions to stay enforcement of § 505 pending appeal, is unpublished and reprinted below at 67a.

JURISDICTION

The three-judge court denied Graff's motion for a preliminary injunction on November 8, 1996, and Graff's notice of appeal was filed on November 12, 1996. 28 U.S.C. § 1253 confers jurisdiction on this Court over any appeal "from an order . . . denying, after notice and hearing, an interlocutory . . . injunction in any civil action . . . required by any Act of Congress to be heard and determined by a district court of three judges." Section 561 of the Telecommunications Act of 1996, Pub. L. No. 104-104, required this action to be heard "by a district court of 3 judges . . . . "

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The First Amendment to the Constitution of the United States provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

Section 505 of the Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 136 (1996), will be codified at 47 U.S.C. § 641 and is reproduced below at 68a.

The implementing regulations of the Federal Communications Commission ("FCC"), *In re Implementation of Section 505 of the Telecommunications Act of 1996*, 11 FCC Rcd. 5386, are published at 61 Fed. Reg. 9648 (March 11, 1996) and reproduced below at 70a.

STATEMENT

Section 505 of the Communications Decency Act ("§ 505" or "the CDA") is highly similar to § 10(b) of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"), which this Court closely scrutinized and struck down last term in *Denver Area Educational Telecommunications Consortium v. FCC*, 116 S. Ct. 2374 (1996) (*"DAETC"*). Because the CDA interferes even more substantially than § 10(b) did with the ability of adults to access speech they would otherwise obtain, the reasons that led this Court in *DAETC* to closely scrutinize and strike down § 10(b) are determinative here as well.

Section 10(b) was presumptively invalid because of its "obvious restrictive effects," which the Court identified as the likely reduction of impulse viewership, its interference with the privacy interests of viewers who choose to watch "indecent" programming, and the adverse costs and burdens it imposes on cable operators. *DAETC*, 116 S. Ct. at 2391.

Also counting against § 10(b) were the special burdens and costs it imposed on the cablecast of specified programming, which were likely "to encourage [the] operator to ban programming that the operator would otherwise permit to run . . . ." *Id.*

After reviewing conceivable alternatives, the Court concluded that § 10(b) does not reveal

> the caution and care that the standards underlying these various verbal formulas impose upon laws that seek to reconcile the critically important interest in protecting free speech with very important, or even compelling, interests that sometimes warrant restrictions.

DAETC, 116 S. Ct. at 2392.[1] The government had merely said — but had not *proved* — that subscriber-initiated blocking or lockboxes were an inadequate solution to the problem of children accessing adult programming: "the reasons [offered by the government] do not show need for a provision as restrictive as the one before us." 116 S. Ct. at 2393.

In striking down § 10(b)'s blocking provision, this Court made plain that the required scrutiny is not a loose balancing of "sexually explicit speech" against "protection of children" in which the latter always wins, but rather a demanding insistence that less restrictive means be employed in preference to more restrictive ones:

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[1] The Court's reference in *DAETC* to the Communications Decency Act as a less-restrictive alternative to § 10(b) does not prejudge the merits of plaintiffs' constitutional challenge. This Court expressly noted in *DAETC* that "we cannot, and do not, decide whether the new provisions are themselves lawful (a matter not before us)." 116 S. Ct. at 2392.

> No provision, we concede, short of an absolute ban, can offer certain protection against assault by a determined child. We have not, however, generally allowed this fact alone to justify reducing the adult population . . . to . . . only what is fit for children'. . . . But, leaving that problem aside, the Solicitor General's list of practical difficulties would seem to call, not for "segregate and block" requirements, but rather for informational requirements, for a simple coding system, for ready availability of blocking equipment (perhaps accessible by telephone), for imposing cost burdens upon system operators (who may spread them through subscription fees); or perhaps even for a system that requires lockbox defaults to be set to block certain channels (say, sex-dedicated-channels).

DAETC, 116 S. Ct. at 2392 (citations omitted).

Section 505 is subject to precisely those same criticisms, and the three-judge court's refusal to preliminarily enjoin enforcement of § 505 ignored this Court's teachings.

1. Prior to 1992, Congress appeared to recognize that the First Amendment prohibited for cable television the content regulation that had been narrowly upheld as permissible for broadcast speech. By abstaining from legislating content restrictions on cable television, Congress acknowledged that the justifications for restricting broadcast speech do not extend to the delivery of cable television programming which can be more narrowly targeted and controlled than universally available over-the-air broadcast signals. Indeed, Congress affirmed this distinction by empowering consumers to selectively block specific cable channels through the use of lockboxes as provided for in the 1984 Cable Act. 47 U.S.C. § 544(d)(2). Until 1992, Congress did not attempt to prohibit or

otherwise regulate indecent speech on cable systems, and courts repeatedly struck down local legislation enacted for that purpose.[2]

In *DAETC*, this Court invalidated Congress's first attempt to directly regulate cable "indecency." The only exception was one provision, §10(a) of the 1992 Cable Act, that did not directly regulate or necessarily affect any programming, but only gave back to cable operators a portion of the editorial discretion that federal law had previously taken from them and given to cable programmers.

2. Section 505 requires that "indecent" or "sexually explicit adult programming" on any channel "primarily dedicated to sexually-oriented programming" must be "fully scramble[d] or otherwise fully block[ed]" so that one not a subscriber to such programming does not receive it. JS App. 68a. Until or unless a cable system acquires the technical means of fully scrambling or blocking the full audio and video signal of such programming on such channels, transmission is to be prohibited "during the hours of the day . . . when a significant number of children are likely to view it," JS App. 68a, which the FCC has determined to be 6:00 a.m. to 10:00 p.m. JS App. 70a.

Section 505 was adopted by the Senate and incorporated into the conference committee bill that the President signed without any legislative findings to support its restrictions. As the District Court noted when it temporarily restrained enforcement of § 505 (JS App. 64a):

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[2] Prior to *DAETC*, courts had unanimously held that restrictions on "indecent" cable programming violate the First Amendment. *E.g.*, *Wilkinson v. Jones*, 480 U.S. 926 (1987) (mem.), *aff'g* 800 F.2d 989 (10th Cir. 1986), *aff'g* 611 F. Supp. 1099 (D. Utah 1985). *See also Goldstein v. Manhattan Cable Television, Inc.*, No. 90 Civ. 4750, 1995 WL 562182 (S.D.N.Y. Sept. 20, 1995); *Altmann v. Television Signal Corp.*, 849 F. Supp. 1335 (N.D. Cal. 1994); *Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985); *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164 (D. Utah 1982); *Home Box Office, Inc. v. Wilkinson*, 531 F. Supp. 987 (D. Utah 1982).

> [T]here is an absolute void of legislative findings that Section 505 is necessary to protect minors from exposure to sexually oriented material shown on adult cable channels which their parents have chosen not to subscribe to . . . .

Indeed, the Senate adopted § 505 without hearings or debate, even though both the House bill (H.R. 1555) and the Senate bill (S. 652) already contained provisions requiring that any cable channel — without regard to content but certainly including those selected for regulation by § 505 — be fully scrambled or blocked to a consumer's home on request (§ 504) and that a ratings system and blocking technology (the V-Chip) be implemented. In support of § 551 (the V-Chip requirement), Congress expressly found that:

> Providing parents with timely information about the nature of upcoming video programming and with the technological tools that allow them easily to block violent, sexual or other programming that they believe harmful to their children is a nonintrusive and narrowly tailored means of achieving that compelling governmental interest.

CDA § 551(a)(9). Despite the carefully-crafted, less-restrictive alternatives contained in the same legislation, as well as the pre-existing lockbox requirement, all of which afford parents the ability to control the sounds and images that enter their homes, Congress nevertheless adopted and the President signed into law the far more restrictive scramble or time-channel requirement of § 505 that applies to all homes in America, whether children live there or not, regardless of the viewing preferences of the adults in the household.

3. Graff and Playboy, cable programmers whose programming was targeted by § 505, each brought suit to challenge this substitution of governmental for parental control, and the actions were consolidated. The District Court issued a temporary restraining order enjoining implementation and enforcement of § 505 on March 7, 1996, holding *inter alia* that there exits "serious and substantial questions as to whether the blocking and FCC time requirements imposed on cable operations by § 505 . . . constitute the least restrictive means of achieving the Government's interest in

regulating the accessibility of adult programming to minors." JS App. 62a.

After expedited discovery, the District Court held a three day hearing on plaintiffs' motion for a preliminary injunction. At the hearing, the parties presented extensive expert testimony and other evidence concerning the impact of § 505 and various available methods of complying with its full scrambling or blocking requirement.

Graff and Playboy demonstrated that the conduits who transmit their speech to the paying public, cable system operators ("MSOs"), would seek to comply by using the "safe-harbor," under which they would simply "not provide" plaintiffs' programming for 16 hours a day ("time-channeling") — *not* through expensive technological upgrades. Plaintiffs further showed, without any contrary evidence,

- that time-channeling would likely reduce viewership in those systems by 30%;[3]
- that an alternative means that the government had suggested for MSOs to comply, "double scrambling with a positive

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[3] Based on "[a]verage buy curves for adult services," TCI, the nation's largest cable operator, estimated "that 30% of adult programming buys would be lost by limiting coverage to 10 p.m.-6.a.m." Graff Trial Exhibit 5, a memorandum from a TCI executive to local system operators, dated February 26, 1996 (the "TCI Memo").

trap,"[4] would reduce viewership by even more, likely in the 50% range in affected systems;[5] and

- that *few if any* MSOs would choose to comply by that route because the costs of doing so are not warranted by foreseeable revenues, particularly in view of the sharply reduced viewership caused by elimination of the opportunity for "impulse" viewing which is a prime characteristic of adult pay-per-view programming.[6]

Responding to the government's simplistic suggestion that viewers who would otherwise obtain pay-per-view programming before 10 p.m. could continue to do so by using their VCRs, plaintiffs demonstrated that the technical requirements for purchasing pay-per-

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[4] The District Court described "[d]ouble scrambling with 'positive trap' technology" as follows (JS App. 22a):

> To achieve double scrambling, RF or baseband scrambling is combined with a jamming signal at the headend. The headend jamming completely blocks video and audio so that no signal bleed occurs in the homes of non-subscribers. In order for a subscriber to view programming that has been double scrambled, the subscriber needs both a positive trap and an addressable converter. The positive trap filters out the interference from the jamming signal, and the addressable converter descrambles the RF or baseband scrambling. The addressable converter can be used to start up and end periods of premium service and also to permit pay-per-view reception.

[5] Several TCI systems that had installed double scrambling technology experienced, on average, a 50% reduction in buy rates of adult programming. *See* TCI memo cited at note 3 *supra*; *see also* JS App. 23a.

[6] Based on uncontroverted evidence that currently non-compliant cable systems would opt to implement time-channeling as the only means of compliance that ensures no risk of violation and that does not require substantial capital costs, the District Court found that:

> The MSOs that have taken a position on the method by which they would comply with § 505 have all announced that they would adopt time channeling.

JS App. 24a.

view programming generally render that impossible (*e.g.*, because the order must be placed contemporaneously from a telephone in the home where the program is to be delivered, and a viewer who working a night shift or asleep cannot make such a call).

The government offered no evidence whatsoever to contradict plaintiffs' proof (a) that MSOs would in fact choose to comply by means of time-channeling, not double scrambling with a positive trap, and (b) that both means of compliance would drastically curtail viewership — by 30% and 50%, respectively. (Moreover, those estimates are highly conservative, since they ignore the probability that MSOs will substitute non-adult programming on channels presently occupied by Graff.)[7] Instead, the government's case depended almost entirely on evidence of the *technological* feasibility of "double scrambling with a positive trap," regardless of its economic impracticality. While the two technical experts presented by the government contended that MSOs *could*, as a technical matter, use double scrambling with a positive trap to comply with the CDA, neither purported to have any knowledge or expertise concerning whether MSOs *would* select double scrambling with a positive trap in preference to time channeling, given its far higher direct costs and much more adverse impact on viewership, or any information about viewership impacts.

The District Court found that although double scrambling with a positive trap was the "most workable alternative" from a technical point of view, it entailed significant implementation costs ($7 for parts and approximately $35 for labor per household plus $750 to

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[7] Undisputed evidence showed a substantial likelihood that many MSOs, faced with "dead" channels for 16 hours each day, the resulting loss of 30% of present revenues, and cable programmers vying for channel capacity, would likely cancel their agreements with plaintiffs (or not renew them) and program other programming instead. For the same reasons, time-channeling will reduce the number of systems entering into carriage contracts with plaintiffs for the first time, since the content-based limitation of carriage to 8 hours a day (most after midnight) severely impairs the attractiveness to MSOs of plaintiffs' programs as compared to those of other programmers.

$1,000 for each system headend, JS App. 22a), "interferes with the spontaneous nature of . . . the impulse purchasing" that drives the pay-per-view business, JS App. 22a, and "raises privacy concerns" because requesting a positive trap, which would be required in order to access Graff's programming, will result in "[t]he new subscriber [being] identified as a consumer of sexually explicit material." *Id.*

Since the record was undisputed that the MSOs which had announced how they would comply would do so by time-channeling (JS App. 24a), the court properly considered § 505's constitutionality on the understanding that MSOs not presently in compliance would time-channel plaintiffs' programming. Graff estimated, based on MSO analyses and its own experience, that time-channeling would reduce Graff's viewership and resulting revenues in affected systems by approximately 30 percent.[8]

4. Despite its evident agreement that time-channeling would cause *some* reduction in viewership, and the lack of any evidence disputing the assessment of MSOs that the reduction would be roughly 30%, the District Court nevertheless denied the motions for a preliminary injunction on November 8, 1996 in a decision by Judge Roth. It did so by holding that lost viewership *pendente lite* is not irreparable harm unless plaintiffs are also likely to succeed on the merits, and by deeming plaintiffs' lost revenues irrelevant to the irreparable injury assessment, even though they would be

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[8] Although the District Court was "skeptical" that Graff would lose fully 30% of its viewership nationally upon implementation, noting that some MSOs are already in compliance (JS App. 22a n.19), whether Graff's *overall* revenues (and viewership) would be reduced by that amount is irrelevant for present purposes. The relevant inquiry is whether § 505 will prevent willing viewers in particular systems from obtaining programming that they would otherwise obtain, not the overall viewership reduction nationally. Any "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976). A law permitting sale of The New York Times in Manhattan only from 10 p.m. to 6 a.m. surely would be held to cause irreparable harm and to violate the First Amendment.

unrecoverable if the CDA were eventually struck down. JS App. 25a & n.20.

On the merits, the District Court believed it could hold time-channeling constitutional in this context because of *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), regardless of the differences in transmission mode — and, therefore, blocking possibilities — between the over-the-air radio broadcast presented in *Pacifica* and the cable delivery at issue here. JS App. 38a-40a.[9]

The government offered no evidence that the less restrictive alternatives to § 505 already contained in federal law are infeasible, yet the court below so held without any evidentiary support. For instance, the District Court "viewed" the parental control measures enacted in § 504 (blocking-on-request) and § 551 (the V-chip and ratings system) "as an adjunct of lesser efficacy because its exercise requires knowledge and the taking of affirmative steps," JS App. 40a, n.28, without any evidence of their actual inefficacy, without any trial period in which these newly enacted safeguards can be tried and without any consideration of the ways that this Court listed in *DAETC*, 116 S. Ct. at 2392, for enhancing the efficacy of information and blocking types of parental control mechanisms.

Rather, the District Court simply assumed, contrary to the legislative intent behind § 504, § 551 and the 1992 Cable Act at issue in *DAETC*, as well as the prescriptions of this Court's First Amendment jurisprudence, that parental control is so ineffective that governmental control is warranted. The District Court had no evidence of inefficacy, and did not appear to consider (as this Court had in *DAETC*) that, if parental control mechanisms are in fact of "lesser efficacy," then the least-intrusive and most effective means of raising their efficacy is to publicize their availability and desirability.

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[9] The FCC made the same assumption, concluding that judicial approval of time-channeling in the broadcast context was a satisfactory basis for upholding time-channeling cable programming regardless of the different blocking mechanisms available to households seeking to employ them. *Order and Notice of Proposed Rulemaking*, 11 FCC Rcd. 5386, 5387 (1996).

The District Court's view that voluntary parental blocking approaches are necessarily ineffective rested on its assumption that for § 504 to achieve the appropriate level of "efficacy," *all* households in presently non-compliant systems that do not subscribe to adult channels would have to be equipped with lockboxes or converters capable of fully blocking the targeted channels. JS App. 39a. There was no basis for that assumption in the statute, the evidentiary record or logic. The government presented no evidence suggesting any necessity for blocking or time-channelling programming in *every* home in the nation regardless of whether children reside there, or whether adults in a given residence feel the need for government-compelled insulation from "signal bleed" — with all the expense and viewership reduction that blocking or time-channelling in every home would entail.

Similarly, in holding that

> in view of the fact that children watch television in the homes of their friends as well as in their own homes, we do not find Congress to have been unreasonable in wishing to extend protection from signal bleed beyond a child's own home,

the District Court ignored that the homes of minor children and their friends comprise less than a majority of American households. JS App. 40a.

5. Graff promptly filed a notice of appeal and simultaneously moved for an injunction against implementation of § 505 pending this Court's disposition of its appeal. On December 5, 1996, the District Court enjoined enforcement of § 505 until final disposition in this Court. JS App. 67a.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Section 505 is a content-based and speaker-based regulation of speech subject to the "strictest" First Amendment review or, at a minimum, to a still "strict" review requiring that it be no more

extensive than necessary.[10] In denying a preliminary injunction against the implementation of § 505, and holding that plaintiffs' First Amendment challenge was unlikely to succeed, the three-judge court emptied strict scrutiny of any real content. The decision effectively reversed the burdens the First Amendment imposes on the government to justify content-based regulation of speech, and ignored congressional findings that "[p]roviding parents with timely information . . . and with the technological tools that allow them easily to block violent, sexual, or other programming that they believe harmful to their children is a nonintrusive and narrowly tailored means" of advancing the government's interest. CDA § 551(a)(9).

In contrast to the low hurdle that the District Court found strict scrutiny posed, this Court has not upheld on strict scrutiny a single statute challenged as violative of free speech in three decades, with the exception of two decisions emphasizing the unique concern for avoiding corruption of the political process.[11] This Court's recent decisions concerning the regulation of cable television, and especially its opinion in *DAETC* striking down 6-3 a highly similar statutory provision requiring cable operators to block "indecent" cable programming absent an express request for that programming, on the ground that there was no proof that less restrictive means were not available, are irreconcilable with the decision below.

I.

DAETC CONFIRMS THAT SECTION 505 VIOLATES THE FIRST AMENDMENT

A statute that imposes content-based restrictions on protected speech, as § 505 does, is unconstitutional unless the government proves that it is the least restrictive means of achieving a compelling governmental interest. *Sable Commun. of Cal., Inc. v. FCC*, 492

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[10] *DAETC*, 116 S. Ct. at 2391.

[11] *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1989); *Buckley v. Valeo*, 424 U.S. 1 (1976).

U.S. 115, 126 (1989).[12] In addition, "the government may not 'reduce the adult population . . . to reading only what is fit for children' . . . [t]he level of discourse reaching a mailbox [or television set] simply cannot be limited to that which would be suitable for a sandbox." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73-74 (1983) (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)).

The undisputed record below establishes that a sizeable number of cable systems around the nation presently lack the technical capability to meet § 505's "blocking or scrambling to full unintelligibility" standard reliably. The record further showed without contrary evidence that the technological means for complying are either presently unavailable or, to the extent available, so grossly uneconomic that most MSOs are highly unlikely to use them in the near future, given the alternative means available of escaping liability (namely, time-channeling or simply

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[12] *See also Turner Broadcasting Sys. Inc. v. FCC*, 114 S. Ct. 2445, 2459 (1994) (where every member of the Court agreed that content-based regulations of cable television are subject to "the most exacting scrutiny"); *Wilkinson v. Jones*, 480 U.S. 926 (1987) (mem.), *aff'g* 800 F.2d 989 (10th Cir. 1986), *aff'g* 611 F. Supp. 1099 (D. Utah 1985).

Justice Breyer and three other members of the Court found it unnecessary to decide in *DAETC* whether the "strictest" First Amendment standard, or a "somewhat less 'strict'" standard, applied to the statute under review. Although § 505 would similarly fail either standard, the strictest test should apply because *Sable*, *Turner*, and *Wilkinson* so held and five members of the Court in *DAETC* agreed that strict scrutiny properly applied. *See* 116 S. Ct. at 2404-2419 (Kennedy and Ginsburg, J.J.), and 116 S. Ct. at 2419-2432 (Thomas and Scalia, J.J., and Rehnquist, C.J.). Presumably, any remaining doubt on that issue will be resolved by *Reno v. American Civil Liberties Union*, No. 96-511, *probable jurisdiction noted*, 65 U.S.L.W. 3414 (U.S. Dec. 6, 1996).

Given the enormous range of speech that local, state, and federal employees and entities could term "indecent," and the vague, offensiveness-based definition that provision has been afforded, subjecting such decisions only to intermediate scrutiny is inconsistent with the freedom of speech protected by the First Amendment.

replacing adult pay-per-view with programming not covered by § 505). JS App. 24a. Indeed, every MSO that announced its compliance plans said it would comply by time-channeling. *Id.*

The District Court therefore correctly treated the issue as whether, in systems not presently in compliance, a governmental prohibition on cablecast of "sexually explicit adult programming" or "other indecent programming" except during a narrow 8-hour period late at night when most viewers are asleep passes strict scrutiny. JS App. 38a.

The court erred, however, both in its approach to answering that question and in the answer it reached, each of which is contrary to the teachings of *DAETC* and its predecessors.

1. Despite a verbal commitment to strict scrutiny, the District Court's holding resulted not from the analysis required by *DAETC* but from a simplistic analogy to *Pacifica*:

> Because the Supreme Court endorsed a time-channeling solution in very similar circumstances in *Pacifica Foundation*, we believe that time-channeling also survives constitutional scrutiny here.[13]

JS App. 38a.

If strict scrutiny means anything, it necessarily requires close attention in the less restrictive means analysis to facts and context. Those were ignored when the court accepted the government's argument that "[for] purposes of indecency regulation, the cable medium cannot be distinguished from broadcasting," and treated time-channeling as a matter of simply analogizing to *Pacifica*

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[13] *See also* JS App. 40a ("Congress enacted, as one of the regulatory options, time channeling, which the Supreme Court had in *Pacifica Foundation* held to be a constitutionally acceptable way of protecting children from a pervasive, sexually explicit medium. Therefore, even if § 505(a) does not pass constitutional analysis, § 505(b) does.").

regardless of the differences between broadcast and cable technology.[14]

Pacifica did not adopt any less-than-strict standard for indecent speech generally, or indecent speech accessible on a television set; to the contrary, Justice Powell's concurrence made plain the lack of any majority for so doing (438 U.S. at 761-62), as did both Justice Kennedy's concurrence in *DAETC* (116 S.Ct. at 2415-16) and Justice Breyer's plurality (116 S.Ct. at 2391). *Pacifica* expressly rested on the premise that "of all forms of communication . . . broadcasting [ ] has received the most limited First Amendment protection." 438 U.S. at 748. The Court expressly noted that its decision was based on the "context" of the broadcast medium, and that a different result might have been reached if non-broadcast ("closed-circuit") transmission had been involved. 438 U.S. at 750.

Moreover, the nature of radio transmission left the FCC with no less restrictive alternatives insofar as Pacifica's broadcast of the Carlin monologue was concerned. *Pacifica* could not have, and did not, address the alternatives afforded by the far more extensive capabilities of cable technology, which render § 505 far from the least restrictive alternative and far more extensive than necessary. The *Pacifica* Court surely did not decide that it is "necessary," in order to protect children from access to audio bleed, to censor adult pay-per-view programming from *every* cabled household in every non-compliant system in the nation for the sixteen hours daily when most persons are awake, even though

- roughly two-thirds of the nation's households are comprised *only* of adults and lack any minor children,[15] and
- specific cable channels, unlike broadcast channels, can be easily excluded from individual households on a

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[14] Defendants' Post-Hearing Mem. at 15 n.6 (July 12, 1996); *see also* n.9 *supra*.

[15] Statistical Abstract of the United States 1995, Dep't of Commerce, Bureau of Census (115 ed. Sept. 1995).

household-by-household (or even television-by-television) basis.

If roughly two-thirds of the nation's households house no minor children, how can it be "necessary" to turn off adult pay-per-view for sixteen hours daily in each of those homes when concerned parents can eliminate access to signal bleed by a simple request for blocking (which under § 504 must be accomplished at the cable operator's expense), and when the government's own witnesses confirmed that blocking on request worked *even before enactment of § 504*?[16] The court below did not make those findings of necessity and narrow tailoring; indeed, it failed even to make the inquiry, concluding instead that, based on *Pacifica*, § 505 was not "unreasonable" and was "an acceptable governmental response" as a matter of settled law. JS App. 40a-41a.

Given the technological susceptibility of cable television (unlike broadcast television or radio) to household-by-household (and indeed television-by-television) blocking, *DAETC* and this Court's prior First Amendment jurisprudence required the government not merely to cite *Pacifica*, but to shoulder the burden of *proving* that time-channelling was the least restrictive means available, or no more restrictive than necessary. To prevail, the government had to show that the congressional goal of aiding parental supervision and pro-

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[16] Of the four witnesses with anecdotal evidence presented by the government, Beth Mahlo confirmed that her cable system provided a lockbox *the same day she requested it, without charge*; Anthony Snesko confirmed that his cable company makes lockboxes available, and notifies subscribers by post card that this option can block programming deemed offensive; Frank Allen, Jr. confirmed that his cable company installed a blocking device after he complained; and Ann Harris testified that her cable operator would have immediately blocked the unwanted material from her television (as it in fact did the next day) but that she asked to delay installation of the blocking device so that she could make the videotape that the government introduced into evidence. *See* Mahlo Decl. ¶ 7 and Mahlo Dep. Tr. 16-17; Snesko Dep. Tr. 51-52; Allen Dep. Tr. 19; and Harris Dep. Tr. 22-23. There was *no evidence* that any parent who sought blocking on request was not able to obtain it promptly and effectively even before enactment of § 504, which now mandates it.

tecting children could not likely be effectively served by giving cable subscribers the tools to block any unwanted channel and the information to enable them to use those tools.

Proper consideration of plaintiffs' First Amendment challenge requires holding § 505 invalid for the same reasons that this Court in *DAETC* invalidated § 10 of the 1992 Cable Act: in both cases, arming parents with tools to eliminate unwanted signals, as now required by § 504 of the CDA, perhaps with an added informational requirement, is a substantially less restrictive alternative than the heavy-handed, viewership-reducing blocking requirements also mandated by Congress. *Cf. Erzoznik v. City of Jacksonville*, 422 U.S. 205, 210-11 (1975).

The record here leaves unanswered the same questions asked by the plurality in *DAETC*, 116 S. Ct. at 2392:

- Why, if customer-initiated blocking "adequately protect[s] children from "patently offensive" material broadcast on ordinary channels . . would [it] not offer adequate protection from similar material" on adult premium channels?
- Why would informational requirements and the ready availability of customer-initiated blocking equipment (perhaps accessible by telephone) not offer adequate protection?
- If costly technological fixes are mandated, why should legislation requiring them be drafted to produce the imposition of such costs on adult programming services only (thereby deterring cable systems from carrying them), rather than on all programming services carrying programming that could cause the same kind of harm (thereby severely reducing the harmful First Amendment impact)?[17]
- Why wouldn't amending the lockbox provision to require "lockbox defaults to be set to block certain channels" (say, sex-dedicated channels) be a less restrictive alternative?

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[17] *See* Point II *infra*.

Because the government had no answers to those questions, the record precluded any conclusion that the restrictions at hand "are a narrowly, or reasonably, tailored effort to protect children." Rather, § 505 is overly restrictive, "sacrificing" important First Amendment interests for too "speculative a gain." *DAETC*, 116 S. Ct. at 2394. Indeed, Congress virtually concluded as much when it found that

> Providing parents with timely information about the nature of upcoming video programming and with the technological tools that allow them easily to block violent, sexual, or other programming that they believe harmful to their children is a nonintrusive and narrowly tailored means of achieving that compelling governmental interest.

CDA § 551(a)(9).

Notably, a combination of programming information and blocking-on-request (now compelled by § 504) is likely to be even more effective than it was in the context of leased access programming — where that combination was nonetheless so presumptively effective that, in the absence of contrary proof, the government was found to have failed to meet its burden of justification. The reason is that a cable subscriber who chooses to eliminate the risk of signal bleed from adult pay-per-view knows (or can be easily and reliably informed by such means as billing inserts or a notice on the scrolling channel guide) precisely where and when adult pay-per-view programming will appear. Parents may, therefore, easily choose to permanently obtain the blocking that § 504 offers.

By contrast, as Justice Thomas observed in *DAETC*, indecent programming on leased access channels was so intermittent, infrequent and random that the practicality of customer-initiated blocking or lockboxes was far less certain:

> Rather than being able to simply block out certain channels at certain times, a subscriber armed with only a lockbox must carefully monitor all leased-access programming and constantly reprogram the lockbox to keep out undesired programming . . . *[T]his distinguishing characteristic of leased access channels* makes lockboxes and reverse-

> blocking [in the context of leased access programming] largely ineffective.

DAETC, 116 S. Ct. at 2429 (Thomas, J., dissenting) (emphasis added).

Ironically, time-channelling would produce the very lack of consistency that concerned Justice Thomas. Once MSOs substitute non-adult programming during daily 16-hour period when adult programming will now be prohibited, parents will no longer be able to block a full channel confident that they are blocking only unwanted speech (as they now are). To the contrary, blocking the time-channeled adult-pay-per-view channel would deprive that family of the newly substituted non-adult programming added during the day and evening (to 10:00 p.m.) in order to replace lost revenue from adult pay-per-view. Parents seeking to keep newly-added daytime non-adult programming but to eliminate any possibility of receiving the adult programming would be faced with the Hobson's choice of either (a) obtaining a lockbox and turning it on and off in the morning and at night, or (b) requesting blocking under § 504, thereby forfeiting access to non-adult programming as the price of blocking adult programming.

2. Because blocking on request is undeniably *less restrictive* than time channeling — allowing all adults who choose to obtain affected programming to do so at the times when they seek to purchase and see it (and when cable operators, free of government restriction, choose to program it) — the only proper basis for finding no likelihood that plaintiffs' challenge would succeed would have been a finding that blocking-on-request was so likely to be ineffective that it was not a cognizable "alternative." The Court implicitly so found only by improperly shifting the burden of proof to plaintiffs:

> We have no evidence in the present record that local cable operators or producers of sexually explicit programming are advertising the free availability of the § 504 lockbox or other blocking devices upon demand. Likewise, there is no evidence that parents are otherwise aware of the § 504 means of achieving complete blocking of undesired channels. *Upon this*

> *record*, the government has demonstrated an expectation that § 504 will not be a viable alternative.

JS App. 40a. (Emphasis added.)[18]

But that reasoning would have led to a different result in *DAETC*, where with the same evidence "missing" this Court nonetheless struck down § 10(b). Speakers challenging laws that literally violate the central command of the First Amendment need not prove that conceivable less restrictive means are *presently* working; under strict scrutiny, it is the government's burden to prove that the means chosen are both necessary and the least restrictive means that could have been chosen to advance compelling governmental interests. *DAETC*, 116 S. Ct. at 2394; *Sable*, 492 U.S. at 128-29.

Thus, the District Court's "we have no evidence" complaints were off the mark. Under First Amendment jurisprudence, it was not plaintiffs' burden (only weeks after § 504 had been enacted!) to

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[18] *See also* JS App. 20a, where, after recounting various means by which cable subscribers can be alerted through public relations efforts that blocking devices will be made available to them, free of charge, upon request . . . [such as] inserts in program guides and bills, informative screens shown on 'barker channels', advertisements run on other channels, and special mailings,

the court held those means legally irrelevant because it had not "received evidence that MSOs are advising cable customers of the availability of the free channel blocks under § 504" or that "customers are responding to such notices, if given." JS App. 21a. This turns strict scrutiny on its head and retroactively penalize plaintiffs for not presenting evidence case law gave them no reason to present. It also blindly assumes that enactment of the free blocking-on-request requirement of § 504, which became law at the same time as § 505, would have no effect on the likelihood that parents would block adult pay-per-view channels from their homes.

Moreover, even if adults are not obtaining blocking on request (and there was no evidentiary basis for that conclusion), that would not necessarily show that § 504 is not an effective less restrictive alternative. An alternative, equally plausible interpretation would be that there is no widespread problem of minors accessing "audio bleed." The government made no empirical showing whatever of the extent of any problem.

show that blocking-on-request was already working so successfully that § 505 was unnecessary; it was the government's burden, having set out on the road of content-based restrictions of protected speech, to prove that such remedies (which had already been stamped with Congress's imprimatur) *cannot* work.[19]

Faulting plaintiffs for not presenting evidence "that local cable operators or producers of sexually explicit programming are advertising the free availability of the § 504 lockboxes" was similarly an improper shift of the government's burden.[20] If § 504 does not prove to be effective without more, then the least restrictive means will be to make it so (*e.g.*, by requiring that subscribers be notified routinely about its availability), not to censor popular, constitutionally-protected programming that Graff seeks to communicate, MSOs choose to disseminate, and adult viewers regularly pay to obtain. *See DAETC*, 116 S. Ct. at 2393 (calling on Congress to eschew blocking "for informational requirements, for a

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[19] For that matter, it was not for plaintiffs to prove the prevalence of audio bleed or the intermittent and random bleeding of video signals, another evidentiary lacuna that the district court held against plaintiffs. JS App. 17a. It was the government's burden to show a compelling need to abridge First Amendment rights.

As against the unilluminating finding that "40 million cable subscribers have the *potential* for a 'bleed' problem," JS App. 17a (emphasis added), is the absence from the record of a single article in any academic journal, newspaper, magazine, or other printed work reporting that teens or children are sitting around and accessing "signal bleed," much less being harmed by doing so. Few phenomena in American society have ever gone so unremarked, unstudied, and unnoticed as audio- or video-bleed from adult pay-per-view programming — a fact particularly striking in view of the enormous media and academic attention on the availability to nearly all sentient children of far more explicit sources of "indecency," including on the Internet (as the record in *Reno v. ACLU* makes plain).

[20] The District Court's criticism was also factually incorrect. Plaintiffs offered testimony and documentary evidence establishing that cable operators can and do routinely advise their customers of the availability of parental control devices and the nature of adult programming that may lead parents to obtain and employ them.

simple coding system, for readily available blocking equipment (perhaps accessible by telephone), [and] for imposing cost burdens upon system operators (who may spread them through subscription fees).")

3. Notwithstanding its nod to strict scrutiny, the District Court's decision, to the extent that it was not based solely on *Pacifica*, was the product of simple balancing: since § 505

> leaves the speaker and the listener with an opportunity to maintain sufficient adult communication, while respecting the privacy interests of those who might be offended or inappropriately exposed[,] [w]e believe the law thus strikes a permissible balance of constitutional interests.

JS App. 39a; *see also id.* at 40a-41a. Under this Court's First Amendment jurisprudence, however, § 505 is subject to far more demanding scrutiny than review for "overall reasonableness" or "permissible balance."

This Court has repeatedly rejected unstructured balancing as being inconsistent with the First Amendment and insufficiently protective of vital First Amendment freedoms. The District Court's "balancing" analysis would justify barring books like *Ulysses* from libraries or general interest bookstores,[21] barring films with nudity from drive-in movie theaters,[22] barring "indecent" cable programming from basic tier cable channels absent written request,[23] barring protestors from demonstrating near foreign embassies,[24] and barring anti-abortion protestors from

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[21] *But see Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383 (1988).

[22] *But see Erzoznik v. City of Jacksonville*, 422 U.S. 205 (1975).

[23] *But see DAETC*, 116 S. Ct. at 2390-94 (plurality opinion) and 2407-16 (Kennedy and Ginsburg, J.J., concurring).

[24] *But see Boos v. Barry*, 485 U.S. 312 (1988).

demonstrating in proximity to "those who might be offended or inappropriately exposed."[25]

To the extent that the District Court in fact accorded § 505 lesser review than was applied in *DAETC* because of its perception that § 505 was directed not at "the speech itself, *i.e.*, sexually explicit adult programming," but rather at "signal bleed, a secondary effect of the transmission of that speech," JS App. 31a, that was clear error as well. Section 505 was directed squarely at the communicative impact of the targeted speech, as its text, structure, and meager legislative history all confirm. That Congress sought to protect persons at whom the speech is not directed and who might, notwithstanding the programmers' hopes and best efforts that they not do so, access the audio signal or, intermittently receive a hard-to-decipher frozen video image, is no warrant for applying any lesser level of scrutiny, when it is precisely the alleged harm from hearing the speech that underlies the regulatory scheme. *See, e.g.*, *Erzoznik*, 422 U.S. at 209-10 (strict scrutiny despite governmental concern for passers by); *Boos v. Barry*, 485 U.S. at 320-21 (1988) (strict scrutiny notwithstanding governmental concern with fact of demonstration as distinguished from content); *Collin v. Smith*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978) (permitting Nazi Party march notwithstanding likelihood that speech would be heard by Jewish residents of Skokie).

II.

THE DIFFERENTIAL TREATMENT ACCORDED IDENTICAL PROGRAMMING, DEPENDING ON THE PROGRAMMER'S PREDOMINANT PROGRAMMING, VIOLATES THE FIRST AND FIFTH AMENDMENTS

Legislation that treats speech differently depending on the speaker's identity is presumptively unconstitutional. Where, as here, legislation on a subject of legitimate governmental concern targets only a subset of potentially responsible speakers, the legislated

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[25] *Compare* JS App. 39a *with Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 (1994).

solution is substantially underinclusive and thus unconstitutional. The government has the burden of proving that such measures "will in fact alleviate the[] harms [they are meant to prevent] in a direct and material way." *Turner*, 114 S. Ct. at 2470. *See also DAETC*, 116 S. Ct. at 2416 ("Partial service of a compelling interest is not narrow tailoring.") (Kennedy and Ginsburg, J.J., concurring in part and dissenting in part); *Florida Star v. B.J.F.*, 491 U.S. 524, 541-42 (1989) ("a law cannot be regarded as protecting an interest 'of the highest order,' and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited") (citation intentionally omitted); and *Bolger*, 463 U.S. at 73 (restriction that "provides only the most limited incremental support for the interest asserted" cannot pass muster even under commercial speech standards).[26]

Section 505 distinguishes between speakers of similar speech; its attempt to protect minors is peculiarly and suspiciously underinclusive in terms of the interest of protecting minors from harmful speech.

Plaintiffs were expressly targeted by name (141 Cong. Rec. S8167). Section 505's sponsors crafted and Congress enacted legislation that exempts from its restrictions (i) all "sexually explicit adult programming or other programming that is indecent" carried on any cable television channel that is not "*primarily* dedicated to sexually-oriented programming," and (ii) all other programming, regardless of how harmful to minors it might be, even though

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[26] *See also Erzoznik v. City of Jacksonville*, 422 U.S. at 215 (laws distinguishing among speakers cannot be justified by the one-step-at-a-time rationale that justifies such distinctions in mere economic regulation); *Simon & Schuster, Inc.*, 502 U.S. 105, 123 (1991) (Blackmun, J., concurring); *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 104-05 (1979); *Arkansas Writers' Project, Inc. v. Ragland, Inc.*, 481 U.S. 221, 230 (1987); and *Carey v. Brown*, 447 U.S. 455, 465 n.9 (1980).

Congress expressly found that certain violent programming was harmful to minors.[27]

The favored speakers outside § 505's purview are left free to carry identical or comparable programming regardless of (i) the size of their audience, (ii) the proportion of the audience comprised of minors, (iii) the absolute number of minors who regularly access such favored channels, having been encouraged to do so through advertising and marketing efforts, or (iv) the time of day. And they are free to do so even though, on those favored (unregulated) channels, minors can view and hear the full signal, and not just the audio signal.

Plaintiffs submitted extensive proof that unregulated, "mainstream" cable channels advertised for families and fully available to minors carry programming indistinguishable (in terms of the regulatory interest) from plaintiffs' programming. By way of example, plaintiffs offered an episode of HBO's "Real Sex" series, showing a sexually-explicit dominatrix performance (whose cablecast would be forbidden by Graff and Playboy guidelines, given its sado-masochistic sexual content), which was carried in Denver at 9:00 on Friday night — prime time for children's television viewing, and a time parents are particularly likely to be away from home or not supervising their children's viewing.

Given § 505's speaker-based distinctions and its substantial underinclusiveness in terms of the stated regulatory interest, the government was required to prove the necessity *both* for the time-channelling effectively imposed by § 505, *and* for restricting that remedy to speakers whose networks are "primarily dedicated to sexually-oriented programming," but do not carry the violent

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[27] CDA § 551(a)(4) (findings underlying V-chip mandate), 110 Stat. 140. Defendants' meagre production of materials collected by the legislative or executive branches concerning the exposure to minors to programming considered questionable (which was available to but in fact not considered by Congress) concerned mostly programming that is not subject to § 505. Much of this programming that remains unregulated is carried on channels that often — if not ordinarily — carry family-oriented programming, such as HBO, Cinemax/ Showtime and MTV.

programming that Congress indicated was harmful to minors as well. *E.g., Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue,* 460 U.S. 575 (1983); *Leathers v. Medlock,* 499 U.S. 439 (1991).

No rationale for these content- and speaker-based distinctions appeared in the scant legislative history. Indeed, the justifications advanced by the Senate sponsors of § 505 apply equally with respect to much of the sexually-oriented programming carried on cable channels such as HBO or hit movie-pay-per-view channels as well as programming carried on leased and public access cable channels around the nation.[28]

The District Court began its analysis by mischaracterizing the claim, referring to a "Fourteenth Amendment Equal Protection" challenge, JS App. 41a, that plaintiffs never made. It proceeded to ignore the central cases on which plaintiffs relied.[29]

Rather than searching for a compelling necessity for enacting such a speaker-based, underinclusive approach to "indecency" and sexually explicit speech on cable television, the court satisfied itself with noting "a significant difference between plaintiffs' networks and the non-adult premium networks," as all of plaintiffs' programming is "adult" whereas only some programming on other networks is "adult." JS App. 41a-42a. In doing so, it ignored every bit of plaintiffs' voluminous comparable programming evidence ex-

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[28] Such material includes popular R-rated movies such as *Disclosure*, *Jade* and *9 1/2 Weeks*, excerpts of which Graff submitted to the district court as videotaped exhibits.

[29] In addition to the cases cited above at 26, the District Court ignored such cases Graff relied on as *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. at 784-85 (1978) ("[T]he legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue"); *FCC v. League of Women Voters*, 468 U.S. 364, 384 (1984) (among the "purest examples of a 'law . . . abridging the freedom of speech . . . [is a] regulation that denies one group of persons the right to address a selected audience"); and *Minneapolis Star Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. at 592-93.

cept the "Real Sex" episode described above, and attempted to minimize that by observing that this program was "one sixteenth" of the number of adult programs shown on plaintiffs' channels that day. JS App. 42a.

Given the asserted governmental interest, however, the relevant measure is not the number of programs or the proportion of a full day that such programming comprises, but rather minors' viewing of such programming. The "problem" addressed by § 505 is the potential for youth access to "sexually explicit adult programming," "indecent programming" and other programming perceived to be "harmful to children," not "signal bleed." Congress did not find, there was no basis on which it could have found, and the government never attempted to prove, that children access more "indecency" through signal bleed on channels subject to § 505 than they obtain through audio and video exposure to other channels (including the leased access channels at issue in *DAETC*, or other channels such as HBO, MTV, and Cinemax/Showtime). To the contrary, as shown by the CDA's blocking-on-request and V-chip provisions (§§ 504 and 551) and the 1992 Cable Act provisions at issue in *DAETC*, Congress knew full well that minors can access "indecent" and "sexually explicit adult" programming, in full, on many cable channels.

Common-sense suggests — and the government made no effort to disprove — that minors are far more likely to obtain "indecent" speech while watching or surfing a popular premium channel like HBO (the single most popular premium cable service, on which Real Sex is cablecast weekly), as compared to an out-of-the-way pay-per-view channel that is partially scrambled and therefore unpleasant to watch. Given the size and demographics of the audience for HBO, Showtime, and other premium cable channels, there is every reason to expect that far more minors see "Real Sex" in its entirety and other "indecent" or "sexually explicit" (or violent) cable programming on such channels than have ever been exposed to signal bleed.

Because the government offered no evidence, and Congress considered none, that would permit the Court to find any necessity for limiting the blocking and scrambling of programming thought

harmful to minors to easy-to-score-political-points-on speakers (Playboy and Graff), the District Court should have concluded that Graff is likely to prevail on its claim that § 505 is so underinclusive and so likely to be ineffective as to violate the First Amendment and the equal protection principle of the Fifth Amendment.[30]

CONCLUSION

Probable jurisdiction should be noted and the case set for plenary review.

Respectfully submitted,

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New York, New York
January 9, 1997

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[30] With respect to the third question presented, concerning § 505's vagueness (*see* p. i *supra*), Graff relies on the argument made in Playboy's Jurisdictional Statement, at 25-29.

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action Nos. 96-94 & 96-107-JJF

Consolidated Actions

PLAYBOY ENTERTAINMENT GROUP, INC.
AND GRAFF-PAY-PER-VIEW INC.,
PLAINTIFFS
V.
UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF JUSTICE, JANET RENO, ATTORNEY GENERAL, AND THE FEDERAL COMMUNICATIONS COMMISSION,
DEFENDANTS.

NOTICE OF APPEAL

Notice is hereby given that Graff Pay-Per-View, Inc., plaintiff in the above captioned action, appeals to the United States Supreme Court pursuant to 28 U.S.C. § 1253 and section 561(b) of the Telecommunications Act of 1996, Pub. L. No. 104-104, §561(b), 110 Stat. 143, from an order denying Graff Pay-Per-View, Inc.'s Motion for a Preliminary Injunction, entered by this Court on November 8, 1996.

YOUNG, CONAWAY, STARGATT & TAYLOR

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Dated: November 12, 1996

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action Nos. 96-94 & 96-107-JJF
Consolidated

PLAYBOY ENTERTAINMENT GROUP, INC.
AND GRAFF-PAY-PER-VIEW INC.,
PLAINTIFFS
V.
UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF JUSTICE, JANET RENO, ATTORNEY GENERAL, AND THE FEDERAL COMMUNICATIONS COMMISSION,
DEFENDANTS.

ORDER

This 8th day of November, 1996, for the reasons stated in the Opinion filed today, it is ORDERED that the plaintiffs' petitions for a preliminary injunction are denied.

/s/ Jane R. Roth
United States Circuit Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action Nos. 96-94 & 96-107-JJF

PLAYBOY ENTERTAINMENT GROUP, INC.
AND GRAFF-PAY-PER-VIEW INC.,
PLAINTIFFS
V.
UNITED STATES OF AMERICA, UNITED STATES
DEPARTMENT OF JUSTICE, JANET RENO,
ATTORNEY GENERAL, AND THE FEDERAL
COMMUNICATIONS COMMISSION,
DEFENDANTS.

November 8, 1996, Decided

November 8, 1996, FILED
DISPOSITION: Plaintiffs' petitions for preliminary injunction denied.

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Before: ROTH[1], *Circuit Judge*, FARNAN[2] and SIMANDLE[3], *District Judges*

OPINION BY: Jane R. Roth

OPINION Wilmington, Delaware November 8, 1996

ROTH, *Circuit Judge*: The plaintiffs in this action, Playboy Entertainment Group, Inc. ("Playboy") and Graff Pay-Per-View ("Graff"), challenge the constitutionality of section 505 of the Communications Decency Act of 1996 ("the CDA" or "the Act"), which is Title V of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Sat. 56. Congress enacted section 505 in an effort to eliminate signal bleed, i.e., the partial reception of sexually explicit adult cable television programming in the homes of nonsubscribers to that programming.

Most cable television systems in the United States offer one or more optional premium channels dedicated to sexually oriented programming. However, of the 62 million households that subscribe to cable television, only about 3 million will purchase or subscribe to adult programming during the course of a year. Cable system operators attempt to block non-subscribers from receiving this programming by various scrambling techniques which we will explain in greater detail in our Findings of Fact. Signal bleed occurs when the scrambling process is not fully successful.

The stated purpose of section 505 is to protect children from signal bleed. Section 505(a) requires a cable television operator to completely scramble or block the video and audio

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1 Judge Jane R. Roth, United States Circuit Court Judge for the Third Circuit.

2 Judge Joseph J. Farnan, United States District Court Judge for the District of Delaware.

3 Judge Jerome B. Simandle, United States District Court Judge for the District of New Jersey.

portions of any cable channel that is primarily dedicated to sexually explicit programming. If a cable operator is unable to comply in full with section 505(a), then section 505(b) requires "time channeling", i.e., that sexually explicit adult programming be transmitted only during those hours when children are not likely to view it. The Federal Communications Commission has determined these "safe harbor" hours to be from 10:00 p.m. to 6:00 a.m. The principal issue facing us is whether government regulation of signal bleed from sexually explicit programming offends the free speech and equal protection rights of adult-programming networks and of their subscriber audience. Our analysis is narrowed by the fact that plaintiffs do not contend that signal bleed itself is protected speech. Moreover, plaintiffs concede that their programming is essentially 100% sexually oriented, in contrast to other entertainment channels that display only occasional or sporadic sexually explicit scenes or programs. Nevertheless, because the regulatory scheme of section 505 impacts on the transmission of adult programming, which is entitled to First Amendment protection,[4] we will examine whether section 505 is a content-based restriction of

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4 We recognize at the outset that the programming on plaintiffs' sexually dedicated channels is indecent, meaning vulgar or offensively explicit sexual material not generally available for viewing by children, but that it is not obscene. Indecent speech is subject to constitutional protection because it is established that "sexual expression which is indecent but not obscene is protected by the First Amendment." *Sable Communications of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126, 106 L. Ed. 2d 93, 109 S. Ct. 2829 (1989); *Fabulous Associates, Inc. v. Pennsylvania Public Utility Comm'n*, 896 F.2d 780, 783 (3d Cir. 1990); *Action for Children's Television v. F.C.C.*, 313 U.S. App. D.C. 94, 58 F.3d 654, 659 (D.C. Cir. 1995) (en banc), cert. denied, 116 S. Ct. 701 (1996); accord, *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996), at 851 (Sloviter, J.), at 858 n.3 (Buckwalter, J.), and at 865-6 (Dalzell, J.).

speech, and, if so, whether it survives scrutiny by addressing a compelling interest and by being narrowly tailored for that end. We will also consider whether Congress has unconstitutionally singled out networks that are exclusively dedicated to sexually oriented programming, while not regulating signal bleed from other premium networks that at times will transmit sexually oriented programs or scenes. Finally, we will examine plaintiffs' claim that the language of section 505 is unconstitutionally vague.

I.

PROCEDURAL BACKGROUND

President Clinton signed the CDA into law on February 8, 1996. On February 26, Playboy filed this action in the United States District Court for the District of Delaware, seeking a declaratory judgment that § 505 violates the First Amendment and the Equal Protection Clause of the Fifth Amendment of the U.S. Constitution. In addition, Playboy sought injunctive relief that would prohibit enforcement of § 505 by the Government.[5] Graff subsequently filed an action seeking identical relief against the same defendants. On March 4, 1996, Judge Farnan granted Graff's motion to consolidate these actions pursuant to Federal Rule of Civil Procedure 42(a). That same day, Chief Judge Dolores K. Sloviter of the United States Court of Appeals for the Third Circuit granted the parties' request to appoint a three-judge district court pursuant to § 561(a) of the CDA. She named Judge Joseph P. Farnan of the U.S. District Court for the District of Delaware, Judge Jerome B. Simandle of the U.S. District Court for the District of New Jersey, and

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5 The defendants in this action are the United States; the United States Department of Justice; Attorney General of the United States, Janet Reno; and the Federal Communications Commission ("the FCC"). To simplify matters, we will refer to these defendants jointly as "the Government."

Judge Jane R. Roth of the U.S. Court of Appeals for the Third Circuit.[6]

Because the CDA was to go into effect on March 9, 1996,[7] Playboy requested a temporary restraining order ("TRO") to enjoin implementation and enforcement of § 505 of the Act. On March 6, 1996, Judge Farnan heard oral argument on Playboy's TRO motion.[8] He granted Playboy's motion on March

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6 Section 561(a) of the CDA provides that a three judge district court shall be convened to decide "any civil action challenging the constitutionality, on its face, of this title or any amendment made by this title . . . pursuant to the provisions of section 2284 of title 28, United States Code." Pub. L. No. 104-104, § 561(a), 110 Stat. 56, 142 (1996). Section 2284 requires that at least one of the judges appointed to serve on the three-judge panel be a circuit judge.

7 Pursuant to § 505(b), section 505 was set to go into effect on March 9, 1996, thirty days after it was signed into law by the President. Pub. L. No. 104-104, § 505(b), 110 Stat. 56, 136 (1996).

8 Section 2284(b)(3) delineates the preliminary matters that may be decided by a single judge from those matters that must be decided by three-judge district courts. That section provides:

> A single judge may . . . grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted, which order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the district court of three judges of an application for a preliminary injunction. A single judge shall not . . . hear and determine any

(continued...)

7, 1996, temporarily enjoining enforcement of § 505 until the matter could be heard by the three judge panel appointed by Chief Judge Sloviter. *Playboy Entertainment Group, Inc. v. United States*, 918 F. Supp. 813 (D. Del. 1996).

In preparation for our consideration of the plaintiffs' Application for a Preliminary Injunction, the parties negotiated a mutually acceptable discovery and briefing schedule. Much of the factual and technical evidence was presented by affidavits and briefs submitted prior to the preliminary injunction hearing. We heard testimony on May 20 and May 21, 1996, and closing arguments were presented on May 22. We concluded that we should delay our decision until after the Supreme Court's decision in *Alliance for Community Media v. F.C.C.*, 56 F.3d 105 (D.C. Cir. 1995). The Supreme Court published its decision on June 28, 1996, sub nom., *Denver Area Education Telecommunications Consortium v. F.C.C.*, 135 L. Ed. 2d 888, 116 S. Ct. 2374 (1996). The parties then submitted supplemental memoranda, as we had instructed, on the impact and applicability of the Supreme Court's decision.

II.

FINDINGS OF FACT

In order to understand fully the arguments made by the parties in this case, it is necessary to understand the technological workings of cable signals and transmission. During the preliminary injunction hearing, the court heard extensive and complex testimony regarding cable technology and the mechanisms available to comply with § 505. Pursuant to

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8(...continued)

> application for a preliminary or permanent injunction. . .. Any action of a single judge may be reviewed by the full court at any time before final judgment.

28 U.S.C. § 2284.

Federal Rule of Civil Procedure 52(a), we make the following findings of fact:

The Statute At Issue

1. Playboy and Graff challenge § 505 of the CDA, entitled "Scrambling of Sexually Explicit Adult Video Service Programming." This section requires a multisystem operator ("MSO")[9] to scramble "sexually explicit adult programming or other programming that is indecent" which is transmitted on a channel "primarily dedicated to sexually oriented programming." Section 505 requires that any such adult channel or network be fully scrambled. The purpose of this scrambling is to eliminate signal bleed." "Signal bleed" is the partial reception of video images and/or audio sounds on a scrambled channel. If an MSO does not or cannot comply with § 505's blocking requirement, the MSO is prohibited from transmitting the adult programming during hours of the day when minors are most likely to view it.[10]

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9 Section 505 applies to "multichannel video programming distributors." These distributors are more simply known as "multisystem operators" or "MSOs" and we will refer to them in this manner.

10 Section 505 provides:

> (a) REQUIREMENT.--In providing sexually explicit adult programming or other programming that is indecent on any channel of its service primarily dedicated to sexually-oriented programming, a multichannel video programming distributor shall fully scramble or otherwise fully block the video and audio portion of such channel so that one not a subscriber to such channel or programming does not receive it.
>
> (b) IMPLEMENTATION.--Until a multichannel video programming distributor complies with the

(continued...)

2. MSOs, such as Telecommunications, Inc. ("TCI") and Time Warner Cable, provide cable subscribers with various packages of cable channels for which subscribers pay a monthly fee. Some subscribers receive a "basic" package or "tier" of channels. A basic cable tier often includes local broadcast networks (like ABC, CBS, and NBC), leased and public access channels, as well as networks devoted entirely to news, education, fine arts, music videos, sports, or shopping. MSOs also provide "premium" tiers, which offer, in addition to the basic tier channels, channels showing recently released movies (like HBO, Cinemax, and Showtime) and channels dedicated solely to adult entertainment. MSOs charge a monthly fee for a basic cable package and additional monthly fees for premium cable channels.

3. Premium programming is also offered by MSOs on a "pay-per-view" basis. A pay-per-view consumer places an order with a cable operator, requesting access to a particular movie or sporting event. A consumer may also purchase programming on a premium channel for a specified period of time. When a consumer places a pay-per-view order, the MSO at the beginning of the requested program unscrambles the signal by

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10(...continued)

> requirement set forth in subsection (a), the distributor shall limit the access of children to the programming referred to in that subsection by not providing such programming during the hours of the day (as determined by the Commission) when a significant number of children are likely to view it.
>
> (c) DEFINITION.--As used in this section, the term 'scramble' means to rearrange the content of the signal of the programming so that the programming cannot be viewed or heard in an understandable manner.

Pub. L. No. 104-104, § 505, 110 Stat. 56, 136 (1996) (to be codified at 47 U.S.C. § 641).

remote accessing of a converter/descrambler box in the subscriber's home. The MSO rescrambles the signal at the conclusion of the program. The fee charged for receiving a program on a pay-per-view basis is always in addition to monthly fees paid for a cable package.

4. Playboy and Graff provide MSOs with adult, sexually oriented video programming. The MSOs then transmit the plaintiffs' programming to premium subscribers and pay-per-view purchasers who request access to such programming. Playboy owns two adult-programming networks: Playboy Television and AdulTVision. Graff also owns two adult networks: Adam & Eve and Spice. The programming on the Playboy and Graff networks is virtually 100% sexually explicit adult programming. In marketing its programming, Playboy relies on both premium subscription and pay-per-view sales, while Graff relies almost entirely on pay-per-view. On a yearly basis, 3 million households subscribe to and/or receive pay-per-view sexually explicit adult programming.

5. Other non-adult premium networks have obtained licenses to exhibit particular Playboy films. In addition, non-adult premium and basic cable channels will, among other programs, transmit sexually explicit programs or programs which contain some sexually explicit scenes. We received evidence of the frequency of sexually explicit programming on non-adult channels. It was demonstrated for example that the number of sexually explicit programs available on non-adult channels on the evening of Friday, May 17, 1996, in Denver, Colorado, was one sixteenth that shown on the plaintiffs' adult channels. Moreover, unlike the adult channels, the sexually explicit programs on non-adult channels were mainly "R" rated movies which contained some sexually explicit scenes but were not continuously sexually explicit as was plaintiffs' programming.

6. MSOs receive signals from many sources, such as master antennas, satellites, and local television stations. The signals are received at the system transmitter or "headend" where they are amplified and retransmitted by coaxial cable. Cable subscribers receive the channels directly by cable, if they

own a cable-ready television, or by attaching the cable to a converter box if they own a non-cable-ready television.[11]

7. Because the cost of premium and pay-per-view programming is in addition to the cost of basic programming, MSOs seek to secure premium network signals for subscribers only. To prevent a signal from reaching the home of a non-subscriber, MSOs "scramble" the signal by blocking a portion of it. Currently, most MSOs scramble premium channel signals using either "RF" or "baseband" technology.

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11 A converter box sits on top of an older model television set which can receive only a finite number of VHF or UHF channels. The converter takes the cable signal and converts it to a channel which can be received by the subscriber's television set. When cable systems began to offer programming, other than local broadcast stations, on channels that television sets designed for broadcast reception were not capable of receiving, MSOs began to distribute these converter boxes to their subscribers. Converter boxes are electronic channel selectors. They are connected both to the subscriber's TV set and to the MSO's cable line. When a subscriber chooses a cable channel to view, the box "converts" the selected channel to a frequency (typically broadcast television channel three or four) that the subscriber's TV set can receive and display.

In about 1980, TV set manufacturers began marketing "cable-ready" TV sets, units equipped with tuners capable of directly receiving cable programming transmitted on non-broadcast (cable only) frequencies. If a subscriber has a cable-ready TV set, and it is capable of tuning all the channels offered by the cable system, the subscriber's line can be connected directly to the TV set.

Generally, this scrambling affects only the video portion of the transmission.[12]

8. When a consumer decides to subscribe to a premium or pay-per-view channel, the MSO must descramble the channel for the new subscriber. This can be done either by installing a positive or negative trap in the coaxial cable leading to the new subscriber's home or by providing the new subscriber with an addressable converter. The trap or the addressable converter descrambles the signal so that the integrity of the image and/or the sound is restored in the set or sets attached to the descrambled line. The MSO can remotely "address" an addressable converter by sending out an electrical impulse. Addressable converters make pay-per-view requests possible by enabling an MSO by remote direction to descramble and then rescramble the cable signals entering the subscriber's home.[13]

9. As mentioned above, one of the technologies used by MSOs to secure premium channels is "positive trapping." For positive trapping, the MSO installs at its transmitter headend an electronic box which jams the signal of the channel to be secured. Non-subscribers to that channel will receive only "snow" for video and a high-pitched beep for audio. Subscribers to the jammed channel receive a metal cylinder, the positive trap, which is attached to the cable-ready TV or to the set top converter box in order to filter out the jamming signal.

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12 Because RF affects only the picture portion of the television transmission, no audio scrambling occurs. Some baseband systems do include audio encryption so that no intelligible audio will be presented to the non-subscribing customers.

13 The previously described converter box and the addressable converter/descrambler can be combined in one set top box.

10. A premium channel's signal can also be secured by "negative trapping." Using this technology, the signal will be transmitted in the clear. A negative trap is installed at the homes of non-subscribers, jamming the signal there.

11. An MSO's choice between using positive or negative trapping will depend on whether the majority of subscribers to the overall cable service also wish to subscribe to a particular premium service. It is cost effective to use negative traps only when a large majority of the customers of a cable system subscribe to a particular premium channel.

12. The problem which § 505 was enacted to remedy is known as "signal bleed." Audio or video "bleed" occurs when a signal is not effectively scrambled by the MSO's RF or baseband equipment. Bleeding does not occur in TV sets with converter boxes that have a feature known as channel mapping.[14] Cable ready television sets, however, do not include this mapping feature. When a consumer with a cable-ready TV tunes to a scrambled premium channel to which the consumer does not subscribe, the consumer receives the jammed signal which under some circumstances includes a video picture or portions of a picture because of a phenomenon called random lockup. The non- subscribing consumer will also receive a clear audio signal unless the MSO's scrambling system is one which scrambles the audio.[15] The severity of this signal bleeding problem varies from time to time and from place to place. The reason for these inconsistencies may be weather extremes, faulty or old equipment, or human error in installing, operating, and/or maintaining systems. Moreover, according to plaintiffs' expert, Dr. Walter Ciciora, the cable-ready TV's that

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14 When a consumer with a converter box attempts to tune a scrambled channel, the converter box will not tune that channel but will tune to another channel, providing either a promotional message or a blue screen.

15 A subscriber will of course receive the descrambled video and audio.

pervade the market today have improved electronic circuitry which will make a discernible picture out of a partly-scrambled signal. This technology, developed over the past two decades, permits the child of a cable subscriber to tune the cable-ready TV to a premium or pay-per-view channel offered on the cable system and to receive discernible images even though the parent is a non-subscriber to that channel.

13. With this incidence of improved electronic technology and/or partially scrambled signals, a non-subscriber may see and hear portions of a channel or program to which he or she does not subscribe. This result is of particular concern when the programming is sexually explicit, intended for an adult-only audience. Families, who do not subscribe to adult entertainment channels, have found that sounds and images from these channels are at least partially discernible. The government presented anecdotal evidence of parents discovering that their children have been exposed to sights and sounds from sexually explicit programming only after the exposure had occurred. This evidence included affidavits from several parents testifying about the danger in their homes of signal bleed from adult programming networks. Other parents complained that, even though their own sets were attached to lockboxes that fully blocked indecent programs, their children were exposed to signal bleed from adult programming when they visited friends. Anecdotal evidence of signal bleed was also presented in letters which had been sent to various members of Congress and were made part of the record before this court. In addition, video tapes of sexually explicit signal bleed were admitted into evidence. For instance, Defendant's Exhibit No.4 was taped from the Playboy Channel in Orange, California. Exhibit No. 4 shows partially scrambled images of a nude woman caressing herself and then of two nude women in the water and in a boat, caressing each other. Defendant's Exhibit No. 5 is an audio tape of the Spice Channel, made by a non-Spice subscriber from the audio bleed. It carries the sounds of what appear to be repeated sexual encounters accompanied by assorted orgiastic moans and groans.

14. There are approximately 62 million households in the United States which receive cable television. Of these, 20 to 25 million have converter boxes to receive basic and/or premium cable service. These converter boxes will map out the scrambled channels and as a consequence these households will not receive "signal bleed." The other 40 million cable subscribers have the potential for a "bleed" problem. It is not clear how many of these 40 million cable homes with the potential for "signal bleed" will not in fact receive signal bleed either because the local MSO employs effective baseband or digital scrambling or because the household is already a subscriber to the adult channels.[16] No evidence was presented of any consumer desire to receive "signal bleed." Moreover, plaintiffs make no claim that "signal bleed" itself is constitutionally protected.

15. On June 12, 1995, after hearings and substantial debate had been held regarding the legislation that was to become the 1996 Telecommunications Act, Senator Diane Feinstein of California and Senator Trent Lott of Mississippi offered Amendment 1269 which ultimately became Section 505 of the Act. Their amendment proposed that MSOs, offering adult programming, should be required to completely scramble the audio and video signals to prevent partial reception of those channels in the homes of nonsubscribers.

16. Senator Feinstein told members of the Senate that "parents . . . come home after work only to find their children sitting in front of the television watching or listening to the adult's-only channel, a channel that many parents did not even know existed." Cong. Rec. S8167; see Playboy Ex. 20. She noted that guidelines which put the burden on the subscriber to request complete scrambling of adult channels were inade-

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16 If at the trial on the permanent injunction more specific evidence of the number of households with the potential for signal bleed were to be presented, we would be in a better position to consider whether the standards for a permanent injunction have been met.

quate because often non-subscribers are unaware that indecent audio and/or video signals can be received. *Id.* The object of the amendment, she said, was to "protect[] children by prohibiting sexually explicit programming to those individuals who have not specifically requested such programming."

17. Senators Feinstein and Lott each spoke briefly about their proposed amendment. 141 Cong. Rec. S8166-S8169. Accompanying the transcript of their statements before the Senate was a memorandum from the American Law Division ("ALD") of the Congressional Research Service. The memorandum analyzed the Feinstein-Lott amendment in light of First Amendment case law and concluded that some language contained in the provision might be unconstitutional and over broad. *Id.* at S8168. Except for the statements of Senators Feinstein and Lott, there was no debate on the amendment and no hearings were held on it. The amendment passed easily in the Senate (91 votes in favor; none opposed) and became § 505 of the bill that emerged from the conference which ironed out the differences between the House and Senate versions. On February 8, 1996, President Clinton signed the bill into law.

18. Section 505 does not eliminate adult programming. Instead, it offers MSOs either the option of fully scrambling the video and audio signals of adult programming or, if complete scrambling is not possible or is not the choice of the MSO, the option of transmitting adult programs only during the "safe harbor" hours. Specifically, pursuant to § 505-(a), MSOs are required to "fully block the video and audio portion of [an adult entertainment] channel so that one not a subscriber to such channel or programming does not receive it." If an operator cannot fully block its adult channels, it must then, pursuant to § 505(b), discontinue programming "during the hours of the day . . . when a significant number of children are likely to view it." The FCC regulation implementing this alternative would limit adult programming to the eight hour period between 10:00 p.m. and 6:00 a.m. We will refer to the requirement found in subsection (a) as "complete

scrambling," and the alternative offered by subsection (b), as "time channeling."

The Technological and Economic Impacts of 505

19. There are MSOs that already meet the requirements of § 505. For example, Steven Saril, Senior Vice President of Sales and Marketing for Graff, testified that roughly half of the systems carrying Graff programming are in compliance with § 505.[17] For the MSOs that are not in compliance, several technologies may become available in the future that would allow an MSO to meet the requirements of § 505. Television manufacturers may soon be required by law to insert the so-called "v-chip," in all new televisions. Pub. L. No. 104-104, § 551, 110 Stat. at 139-41. The v-chip will allow parents to block types of programming which they find inappropriate for their children. The v-chip is currently being tested in Canadian markets. It is not clear, however, how long it will be before televisions with v-chips become widely available in the United States.

20. Digital cable technology is another future option that will permit MSOs to completely scramble signals to nonsubscribers as § 505 requires. Approximately 2 million American consumers presently receive digital television service. Digital signals will prevent all audio and video bleeding, but digital service will require conversion of the MSOs' headend equipment from analog to digital technology. As MSOs adopt digital service, they will probably use it first for premium channels, including adult programming.

21. Because the currently used "RF" and "baseband" technologies are not capable of fully scrambling both the audio

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17 Saril also testified that the Spice network might go out of business if the non-complying channels were required to time channel. The Graff "standard agreement," however, requires an MSO to carry Spice only during the hours of 9 p.m. to 3 a.m. - hours that are very close to the safe harbor time period.

and video signal at all times, many MSOs would be required, if § 505(a) was enforced today, to resort to other and/or additional scrambling techniques. If an MSO was not able or willing to initiate additional scrambling techniques, it would be required to time channel adult programming.

22. One device which has been available for several years and which succeeds in fully scrambling unwanted cable signals is the lockbox. Since the early 1980s, MSOs have been required by law to provide a lockbox to any customer upon request. Section 544(d) of the 1984 Cable Act requires that cable operators either sell or lease a blocking device to any subscriber who requests that a channel be completely blocked. See 47 U.S.C. § 544(d)(2)(A). However, few households have obtained the lockboxes made available by this provision.

23. Section 504 of the CDA also requires MSOs to completely block upon request any programming that a cable customer finds personally offensive. This blocking requirement is not limited to the "sexually explicit adult video service programming" which is the target of § 505. Pub. L. No. 104-104, § 504, 110 Stat. 56, 136 (1996). Moreover, under § 504, the MSO, rather than the subscriber, is responsible for bearing the cost of providing the blocking mechanism.[18] Despite this economic burden, plaintiffs suggest that § 504 presents a constitutional, "less restrictive alternative" because it would require an MSO to provide complete blocking only upon request. Plaintiffs also assert that cable subscribers can be alerted through public relations efforts that blocking devices will be made available to

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18 Section 504(a) provides:

> (a) SUBSCRIBER REQUEST.--Upon request by a cable service subscriber, a cable operator shall, without charge, fully scramble or otherwise fully block the audio and video programming of each channel carrying such programming so that one not a subscriber does not receive it.

Pub. L. No. 104-104, § 504, 110 Stat. 56, 136 (1996) (emphasis added).

them, free of charge, upon request. Methods of disseminating this information could include inserts in program guides and bills, informative screens shown on "barker channels", advertisements run on other channels, and special mailings. We have not, however, received evidence that MSOs are advising cable customers of the availability of the free channel blocks under § 504. Nor is there evidence that customers are responding to such notices, if given. Thus, we cannot effectively assess plaintiffs' claim that § 504 is likely to become a viable remedy for eliminating signal bleed. If the § 504 blocking option is not being promoted, it cannot become a meaningful alternative to the provisions of § 505. At the time of the permanent injunction hearing, further evidence of the actual and predicted impact and efficacy of § 504 would be helpful to us.

24. MSOs that adopted the lockbox remedy, in order to comply with § 505, would be required to provide all nonsubscribers with a lockbox programmed to block the audio and video signals of adult entertainment networks. A mapping converter with a lockbox feature allows parents to control when adult programming will be received and when it will be blocked. Most lockboxes currently available are capable of blocking only signals entering the television set to which the box is attached. In order to fully block access to sexually oriented programming at all times, each cableconnected TV set in the home would have to be connected to a lockbox. A single converter/lockbox costs approximately $115. If MSOs that offer adult programming were to distribute one converter/lockbox to every nonsubscribing household currently without one, the total cost would be prohibitive, probably in excess of one million dollars.

25. In the alternative, MSOs could provide "negative traps" to nonsubscribers. A "negative trap" is installed on the cable wiring of non-subscribing households and scrambles a clear signal. Subscribers to adult channels receive the clear signal without the negative trap. Negative trapping costs between $12 and $15 per household. It is an economically feasible

solution only in areas, such as military bases, where a large majority of cable subscribers want to receive the adult channel.

26. Double scrambling with "positive trap" technology provides the most workable alternative for non-complying MSOs. To achieve double scrambling, RF or baseband scrambling is combined with a jamming signal at the headend. The headend jamming completely blocks video and audio so that no signal bleed occurs in the homes of non-subscribers. In order for a subscriber to view programming that has been double scrambled, the subscriber needs both a positive trap and an addressable converter. The positive trap filters out the interference from the jamming signal, and the addressable converter descrambles the RF or baseband scrambling. The addressable converter can be used to start up and end periods of premium service and also to permit pay-per-view reception. Positive trap technology would be economically advantageous in areas where nonsubscribers outnumber subscribers. If the positive trapping alternative were adopted by an MSO, positive traps would be delivered to or installed at an households subscribing to adult programming. The average cost of a positive trap is $7. A positive trap is easily installed by the subscriber or it can be installed by the MSO at a cost of approximately $35. The cost of the additional equipment necessary for jamming at the MSO's headend is estimated to be $750 to $1,000.

27. Positive trapping technology poses an additional problem for pay-per-view purchases. Customers either have to pick up a positive trap or order it in advance of viewing the desired program. This interferes with the spontaneous nature of what plaintiffs consider to be the impulse purchasing of sexually explicit adult programming.

28. Professional installation of traps also raises privacy concerns. A subscriber, who enjoys adult entertainment at home, might be dissuaded from requesting a positive trap upon realizing that the MSO will learn his or her identity. The new subscriber will be identified as a consumer of sexually explicit material - although with sexually explicit premium and

pay-per-view programming, the subscriber will also be identifiable through billing for the programming.

29. A few MSOs have already adopted "double scrambling" to resolve community opposition to sexually explicit programming and to the audio and/or video bleeding of signals from such programming. Plaintiffs contend that in these double-scrambling communities revenues from adult channels has fallen by fifty per cent. Plaintiffs are of the opinion that a significant factor causing this drop in revenue is the impulse nature of the purchase or adult programming.

30. Finally, an MSO has the option of complying with § 505 by "time channeling" as provided in subsection (b). If an MSO cannot or chooses not to completely scramble audio and/or video signals as required by § 505(a), it must restrict adult program to certain "safe harbor" hours. In preparation for implementing § 505, the FCC established a regulation that defines the safe harbor hours as the eight hour period between 10:00 p.m. and 6:00 a.m. In re Implementation of Section 505 of the Telecommunications Act of 1996, CS Dkt. No. 96-40, FCC 96-84, Order & Notice of Proposed Rulemaking amending 47 C.F.R. § 76 ¶ 6 (released March 5, 1996; intended to become effective March 9, 1996). If time channeling were adopted by an MSO, adult cable programming would not be available in the MSO's service area except during the safe harbor hours. Plaintiffs estimate that their revenues would fall approximately thirty per cent if time channeling were adopted.[19]

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19 We are skeptical of plaintiffs' estimate of revenue loss. It appears to be significantly overstated. Although Graff's Vice President, Steven Saril, stated that 30 percent of those who purchase his company's programming do so outside the safe harbor hours, many of these customers may not be affected by time channeling because half of the cable systems, carrying Graff channels, already comply with § 505(a). The customers of these MSOs will still be able to view Graff's channels outside the safe harbor period.

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31. The MSOs that have taken a position on the method by which they would comply with § 505 have all announced that they would adopt time channeling.

III.

CONCLUSIONS OF LAW

A. The Preliminary Injunction Standard

Playboy and Graff have asked this court to exercise extraordinary judicial authority by striking down a law drafted and adopted by a co-equal branch of government. The plaintiffs' request raises one of the judiciary's most "awesome responsibilities calling for the utmost circumspection in its exercise." *Heart of Atlanta Motel, Inc. v. United States*, 13 L. Ed. 2d 12, 85 S. Ct. 1, 2 (1964). After thorough examination and discussion, we conclude that, at this preliminary injunction stage, we will not strike down § 505. As the case has presently been developed before us, the plaintiffs have not met the requirements for the issuing of a preliminary injunction. We will, therefore, deny their petition for preliminary relief.

The standard used to determine whether plaintiffs are entitled to a preliminary injunction is well established. In order to succeed, plaintiffs must demonstrate that they are likely to prevail on the merits and that they will suffer irreparable harm if they are not granted injunctive relief. We must also consider

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Moreover, Saril admitted on cross-examination that 21% of the non-safe-harbor purchases occur at 9:00 or 9:30 p.m., and that a 10:00 p.m. starting time would cause no loss of revenue. He further admitted that people may rearrange their viewing schedule or use a VCR to tape adult programming during the safe harbor hours, again preserving Graff's revenues. Finally, plaintiffs acknowledge some remaining elasticity in the pricing of sexually explicit programming. Graff would be able raise its rates a certain extent without losing customers.

whether the potential harm to the defendant that will result from the issuing of a preliminary injunction outweighs the harm that may fall upon the plaintiffs if such relief is denied, and whether granting the requested injunctive relief is in the public interest. *American Civil Liberties Union v. Reno*, 929 F. Supp. 824, 851 (E.D. Pa. 1996) (citing *Campbell Soup Co. V. ConAgra, Inc.*, 977 F.2d 86, 90-91 (3d Cir. 1992) and *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1175 (3d Cir. 1990)); *see also Clean Ocean Action v. York*, 57 F.3d 328, 331 (3d Cir. 1995).

In a case such as this one, in which the alleged injury is a threat to First Amendment interests, the finding of irreparable injury is often tied to the likelihood of success on the merits. American Civil Liberties Union, 929 F. Supp. at 851 (citing *Elrod v. Burns*, 427 U.S. 347) (1976)). The loss of First Amendment freedoms is unquestionably irreparable injury. Elrod, 427 U.S. at 373 (citing *New York Times Co. v. United States*, 403 U.S. 713 (1971).

Conversely, however, if the only irreparable injury alleged is the loss of first amendment freedoms, the likelihood that plaintiffs will not succeed on the merits creates an equal likelihood that they will not suffer First Amendment injury.[20] Constitutional injury cannot occur if there is not a constitutional violation. We will, for this reason, turn our inquiry first

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20 Plaintiffs also claim that they will suffer financial loss. Financial loss is not, however, the type of irreparable injury that warrants the granting of injunctive relief. See, e.g., In re Arthur Treacher's Franchisee Litigation, 689 F.2d 1137, 1145 (3d Cir. 1982). To the extent that plaintiffs may suffer financial loss for which they will not be reimbursed, that economic burden is an element which we considered infra in the balancing of harms, particularly in our discussion of the benefit to the public of time channeling (per *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 57 L. Ed. 2d 1073, 98 S. Ct. 3026 (1978)) and its availability under § 505 as an alternative to complete scrambling.

to the issue of the plaintiffs' likelihood of success on the merits.

Plaintiffs challenge § 505 on grounds that it (1) infringes the free speech protections provided by the First Amendment of the U.S. Constitution, (2) violates the Equal Protection Clause of the Fourteenth Amendment or the U.S. Constitution, and (3) contains unconstitutionally vague terminology. With regard to all three of these claims, we conclude that Playboy and Graff have failed to meet the preliminary injunction test. They have not persuaded us that they are likely to prevail on the merits if any of these three claims are ultimately litigated. Moreover, they have not demonstrated that the public interest is served by permitting signal bleed to invade nonsubscribers' homes, particularly in view of our interest in protecting children from a pervasive medium which transmits sexually explicit sounds and images and in view of the continuing availability under § 505 of sexually explicit adult programming during the safe harbor hours.[21]

B. First Amendment Jurisprudence

Playboy and Graff claim that § 505 burdens their rights guaranteed under the First Amendment by inhibiting their freedom of speech. The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech." U.S.

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21 In our discussion, we do not separate out the elements to consider with regard to the issuing of an injunction, i.e., likelihood of success on the merits, irreparable harm, balancing of harms, and public interest. First, in this context of a claim of unconstitutional restriction of free speech, the harm and public interest elements are important factors in determining the likelihood of success on the merits. These factors will therefore be discussed in conjunction with the merits of the claims. Second, as we note above, our irreparable harm analysis is subsumed by our finding that plaintiffs are not likely to succeed on the merits.

Const. amend. I. The Supreme Court has been exacting in its protection of this First Amendment right. Moreover, as circumstances and technologies have changed, the Court has adapted free speech protection to meet these changes.

We postponed our decision here until the Supreme Court reached its decision in a case dealing with a similar field of developing technology - that of leased and public access cable channels. *See Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C.*, 135 L. Ed. 2d 888, 116 S. Ct. 2374 (1996) [hereinafter Denver Consortium]. In *Denver Consortium*, the plaintiffs challenged three sections of the Cable Television Consumer Protection and Competition Act of 1992, which placed restrictions upon indecent programming aired on leased and public access cable channels.[22] Pub. L. No. 102-385, 106

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22 The plaintiffs in Denver Consortium challenged sections 10(a), 10(b), and 10(c) of the 1992 Cable Act. These provisions were to be applied to "leased access channels" and "public, educational, or governmental channels" ("PEG channels"). Section 10(a) "permit[s] a cable operator to enforce prospectively a written and published policy of prohibiting programming [on leased access channels] that the operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." 1992 Cable Act, § 10(a)(2). Section 10(b) requires that, if cable operators choose not to ban sexually explicit programming as permitted under § 10(a), when they broadcast such programming on leased access channels, they must completely segregate and block the signal carrying the indecent programming. 1992 Cable Act, § 10(b). According to regulations promulgated pursuant to § 10(b), leased access programmers must inform cable operators if their programming will be indecent, and cable operators must then place that programming on a single channel. 47 C.F.R. § 76.701(d) (1995). The signal of this

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Stat. 1460, 1486, §§ 10(a), 10(b), and 10 (c) (codified at 47 U.S.C. §§ 532(h), 532(j), and note following § 531) ("the 1992 Cable Act"). A majority of the Supreme Court agreed that § 10(b) of the 1992 Cable Act was unconstitutional, but the Court was unable to form a majority regarding the constitutionality of the remainder of the Act.[23]

Justice Breyer wrote for the Court regarding § 10(b), but thereafter he wrote for a plurality, which upheld § 10(a) and struck down § 10(c). One of the seemingly unresolved aspects of *Denver Consortium* is the standard of scrutiny we should ap-

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22(...continued)
single channel must be completely blocked by the cable operator, and unscrambled only upon the written request of an adult subscriber. *Id.* at § 76.701(b). Upon receiving a subscriber's request, the operator must provide access to the blocked channel within thirty days and, if that subscriber later asks that the channel be re-blocked, the operator must accommodate the subscribers request, again within 30 days. *Id.* at § 76.701(c).
Section 10(c) is similar to § 10(a) but applies only to PEG channels. It instructs the F.C.C. to enact regulations that would permit a cable operator "to prohibit the use, on [a cable system], of any channel capacity of any public, educational, or governmental access facility for any programming which contains obscene material, sexually explicit, conduct, or material soliciting or promoting unlawful conduct." 1992 Cable Act, § 10(c).

23 Unlike leased and public access channels, the Graff and Playboy networks are commercial premium channels. The segregation of adult programming and the scrambling of adult channel signals, which concerned the Court in Denver Consortium, is, in the context of adult channels, a commercial decision which MSOs have made in order to limit access to those viewers who pay to subscribe to the adult channels.

ply in our analysis here. The plurality suggested that it was "unwise and unnecessary" to decide whether a lower standard of scrutiny, such as that applied in *F.C.C. v. Pacifica Foundation*, 438 U.S. 726 (1978), should apply in the cable context. *Denver Consortium*, 116 S. Ct. at 2385. It was unnecessary to specify a specific standard because § 10(b) could not pass constitutional muster either under strict scrutiny or under a less rigorous standard. And, it was unwise to declare a "rigid single standard" for fear of dampening the rapid rate of development in the field of communications technologies.

The other five members of the Court suggested that strict scrutiny remained the applicable standard where a law restricted speech on the basis of its content. Thus, these members of the Court would have required that the law be "narrowly tailored" to achieve a "compelling" government interest in order to survive constitutional review. Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia believed that all three challenged provisions of the 1992 Cable Act were constitutional and that even § 10(b) would survive strict scrutiny. *See id.* at 2422, 2428-29 & 2432 (Thomas, J., concurring in part and dissenting in part). Justice Kennedy, joined by Justice Ginsburg, would have held to the contrary that strict scrutiny was fatal to the challenged provisions and all three should be struck down. *See id.* at 2405-07, 2416-17, & 2419 (Kennedy, J., concurring in part and dissenting in part). In the aftermath of the *Denver Consortium* decision, it is clear only that we should apply either strict scrutiny or something very close to strict scrutiny when a content-based law, applicable in the cable television context, is challenged on grounds that it violates the First Amendment.[24]

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24 We recognize that several Supreme Court pluralities have suggested that sexually explicit material receives less protection under the First Amendment than, for example, artistically, politically, or scientifically valued forms of speech. For example, in *Young v. American Mini Theatres,*

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However, whatever the standard of scrutiny, as Justice Breyer stated for the Court in *Denver Consortium*: "The essence of that protection is that Congress may not regulate speech except in cases of extraordinary need and with the exercise of

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24(...continued)

Inc., 427 U.S. 50, 49 L. Ed. 2d 310, 96 S. Ct. 2440 (1976), a plurality of the Court explained:

> Even though we recognize the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate that inspired Voltaire's immortal comment ["I disapprove of what you say, but I will defend to the death your right to say it."]. Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theatres of our choice. Even though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification . . . .

Id. at 70-71. This plurality also noted that "even within the area of protected speech, a difference in content may require a different governmental response." *Id.* at 66. The plurality opinion in Pacifica Foundation similarly suggested that a lower standard of scrutiny may be appropriately applied in certain contexts when the content of the regulated material is offensive, vulgar, or shocking. See Pacifica Foundation, 438 U.S. at 744-48.

a degree of care that we have not elsewhere required." *Id.* at 2384.

The first step that the majority took in *Denver Consortium* was to scrutinize the statute to assure that it properly addressed "an extremely important problem, without imposing, in light of the relevant interests, an unnecessarily great restriction on speech. *Id.* at 2385. The Court defined the problem as the protection of children from exposure to patently offensive depictions of sex. *Id.* It was to address this same that Congress enacted § 505.

Section 505 differs, however, from the statute at issue in *Denver Consortium* and from most statutes that are directed at speech or at the regulations of speech in that the target of § 505 is not the speech itself, i.e., sexually explicit adult programming. The target is signal bleed, a secondary effect of the transmission of that speech. Moreover, § 505 is directed at this secondary effect because signal bleed is intruding into the homes of television viewers who have chosen not to receive the underlying sexually explicit programming.

This focus of § 505 on a secondary effect of speech leads us to our next inquiry, whether § 505 is "content-based" or "content- neutral." *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986). As we have noted, in *Denver Consortium* five justices agreed that a content- based strict scrutiny standard should apply. We conclude here, but not without considerable deliberation, that § 505 should be treated as a content-based restriction on speech. Even though § 505 is aimed at the content-neutral objective of preventing signal bleed, the section applies only when signal bleed occurs during the transmission of "sexually explicit adult programming or other programming that is indecent." It does not apply when signal bleed occurs on other premium channel networks, like HBO or the Disney Channel. Thus, Congress targeted signal bleed based on its sexually explicit content, rendering § 505 a "content-based" restriction. We will therefore apply content-based analysis.

We must, however, also consider content in context. We cannot ignore the fact that the households that receive signal bleed have not subscribed to the adult channel which transmits the unwanted images and sounds. Nor can we ignore the fact that cable television is a means of communication which is pervasive and to which children are easily exposed. The Supreme Court has recognized that cable television is as accessible to children as over-the-air broadcasting, if not more so. *See Denver Consortium*, 116 S. Ct. at 2386.

Moreover, the Supreme Court in its consideration of freedom of speech under the First Amendment has recognized the need to protect children from sexually explicit material, particularly in the context of a pervasive medium. *See Denver Consortium*, 116 S. Ct. at 2386 ("The provision before us comes accompanied with an extremely important justification, one that this Court has often found compelling -- the need to protect children from exposure to patently offensive sex-related material."); *Sable Communications of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989) ("We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards."); *New York v. Ferber*, 458 U.S. 747, 756-57 (1982) ("It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'" (citation omitted)); *Fabulous Assocs. Inc. v. Pa. Pub. Util. Comm'n*, 896 F.2d 780, 787 (3d Cir. 1990) ("There is little question that the interest of the state in shielding its youth from exposure to indecent materials is a compelling state interest.").

Nor are the courts alone in finding that children should be protected from exposure to sexually explicit materials. In 1986, the Attorney General's Commission on Pornography issued a final report that reached similar conclusions regarding the effects of "non-violent and non-degrading," sexually explicit materials on children. The Commission explained:

> Perhaps the most significant potential harm in this category exists with respect to children. We all agree that at least much, probably most, and maybe even all material in this category, regardless of whether it is harmful when used by adults only, is harmful when it falls into the hands of children . . . . We have no hesitancy in concluding that learning about sexuality from most of the material in this category is not the best way for children to learn about the subject. There are harms both to the children themselves and to notions of family control over a child's introduction to sexuality if children learn about sex from the kinds of sexually explicit materials that constitute the bulk of this category of materials.
>
> We have little doubt that much of this material does find its way into the hands of children, and to the extent that it does we all agree that it is harmful. We may disagree about the extent to which people should, as adults, be tolerated in engaging in sexual practices that differ from the norm, but we agree about the question of the desirability of exposing children to most of this material, and on that our unanimous agreement is that it is undesirable.

U.S. Dept. of Justice, Attorney General's Commission on Pornography, July 1986, at 343-44 (Def.'s Ex. 80).[25]

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25 In considering harm to children, we have not relied on the study conducted by Government's expert witness, Dr. Diana M. Elliott, Ph.D. See Diana M. Elliott, Children's Exposure to Pornography: Prevalence and Impact (Def.'s Ex. 79). We understand, as she testified, that it would be unethical to expose children to pornography in order to test their reactions to sexually explicit material, but, for a

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As a result, we conclude that § 505 clearly addresses a recognized "compelling interest," and it remains only for us to determine whether the provision is carefully tailored to serve that end. For the reasons that we now develop, and particularly on the basis of the Supreme Court's ruling in *F.C.C. v. Pacifica Foundation*, 438 U.S. 726 (1978), we hold that Congress has adopted, at least in respect to § 505(b), a carefully tailored, and constitutional, solution.[26]

25(...continued)
number of reasons, we have concerns regarding the reliability of her methods and conclusions. Her results strike us as anecdotal and possibly misleading. Because the parties stipulated prior to the preliminary injunction hearing that all evidence submitted would be admissible, we did not consider the admissibility of her study under the rules established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) and *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717 (3d Cir. 1994), cert. denied, 115 S. Ct. 1253 (1995). Instead, the reliability concerns that the court had regarding Dr. Elliott's research were considered only in weighing the evidence. We ultimately decided that her research should not be given weight in coming to our present decision. If plaintiffs plan to seek a hearing in order to request a permanent injunction before this panel, it would be helpful if the parties would provide the court with additional evidence demonstrating the effects of sexually explicit materials on children.

26 The Supreme Court held in an earlier "secondary effects" decision, regarding the exposure of the unwilling viewer to nudity, that a city ordinance was invalid which barred the exhibition in drive-in theaters of motion pictures in which human male or female bare buttocks, human female bare breasts, or human bare pubic areas were shown if the motion picture was visible from any public street or public
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In *Denver Consortium*, a plurality of the Supreme Court acknowledged that case's similarity to *Pacifica Foundation*, noting that, like the broadcast system at issue in *Pacifica Foundation*, "cable television systems . . . 'have established a uniquely pervasive presence in the lives of all Americans.'" *Denver Consortium*, 116 S. Ct. at 2386 (quoting *Pacifica Foundation*, 438 U.S. at 748). It was largely the pervasive nature of broadcast media that motivated the Court in *Pacifica Foundation* to uphold governmental restrictions placed on radio broadcasts of indecent material.

We wholeheartedly agree with the plurality's finding in *Denver Consortium* that cable television is now "uniquely pervasive." *Id.* The plurality also noted that "cable television broadcasting . . . is as 'accessible to children' as over-the-air broadcasting if not more so." *Id.* Justice Souter further explained:

> While we have found cable television different from broadcast with respect to the factors justifying intrusive access requirements under the rule in *Red Lion* [*Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969)], *see Turner Broadcasting System, Inc. v. F.C.C.*, [512 U.S. 622 (1994)] (finding that

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26(...continued)

place. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 45 L. Ed. 2d 125, 95 S. Ct. 2268 (1975). We find the present case distinguishable from *Erznoznik* in that it is not an occasional glimpse of a portion of nude anatomy which is visible in the signal bleed from adult channels, but instead it is an unbroken continuum of sexually explicit sounds and images, delivered without invitation to one's home rather than to passers-by on a public highway. We believe it is likely that if the Jacksonville ordinance at issue in *Erznoznik* had been directed solely at the display of 100% sexually explicit films which were visible from the public street and from private homes, the ordinance would have been held to be valid.

> *Red Lion's* spectrum scarcity rationale had no application to cable), today's plurality opinion rightly observes that the characteristics of broadcast radio that rendered indecency particularly threatening in *Pacifica*, that is, its intrusion into the house and accessibility to children, are also present in the case of cable television.

Id. at 2401-02 (Souter, J., concurring) (citation omitted).

There is no question that a commanding majority of households in this nation subscribe to cable programming. As a result of imperfect signal scrambling, millions of children then have potential access not only to indecent sounds, similar to those raising concern in *Pacifica Foundation*, but also to sexually explicit visual images. In the homes of families who do not subscribe to sex-dedicated networks, these images enter as an offensive pollutant. They invade the household and "confront[] the citizen . . . in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *Pacifica Foundation*, 438 U.S. at 748; *see also Denver Consortium*, 116 S. Ct. at 2386 (plurality opinion).

In *Pacifica Foundation*, the Supreme Court found it undisputed that George Carlin's "Filthy Words" monologue was "vulgar," "offensive," and "shocking." 438 U.S. at 747. The Court noted that, in the right context, the speech deserved First Amendment protections, providing adult listeners with a right to find Carlin's observances funny and provocative, instead of vulgar and offensive. The Court therefore examined the context of the monologue, broadcast at 2 o'clock in the afternoon. It emphasized the ubiquitous nature of broadcast radio and recognized that airing Carlin's performance at the time "could have enlarged a child's vocabulary in an instant." *Id.* at 749.

Similarly, when cable signal bleed occurs, children may be exposed to the sights and sounds of sexually explicit films and other adult programming. Such programming has the potential to affect not only a child's vocabulary, but also his or her capacity for inappropriate conduct that is sexual in nature. We believe that the danger of prematurely exposing children to

video and audio transmissions of graphic adult sexual behavior is even more troublesome than the exposure to offensive language that was at issue in *Pacifica Foundation*.

Indeed, the parties do not dispute that the government has a well-established compelling interest in protecting children from unsupervised exposure to sexually explicit material.

We then turn to the solution which Congress crafted in § 505. Congress provided MSOs with two alternative methods of compliance with the section: (1) complete scrambling, or (2) time-channeling the programming into safe-harbor hours. Playboy and Graff argue that very few MSOs will be financially able to comply with § 505 by distributing expensive equipment that will fully scramble the signals of sex-dedicated networks as required by subsection (a). Plaintiffs fear that MSOs will drop adult programming entirely, rather than invest in technologies which will be made obsolete by the v-chip or that MSOs will transmit plaintiffs' networks for an unprofitably short eight-hour period. Not only do the plaintiffs foresee lost profits, they present the possibility of bankruptcy caused by implementation of § 505.

There is undoubtedly a substantial expense involved in complying with subsection (a). However, while an economic burden may warrant consideration when weighing the relative harms imposed by a law, economics alone cannot dictate the result where constitutional rights are at issue. *See Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 78 (1976) (Powell concurring); *Mitchell v. Comm'n on Adult Entertainment Establishments*, 10 F.3d 123, 144 (3d Cir. 1993).[27] Moreover, § 505 does not require that MSOs shoulder potentially fatal economic burdens. If the economic hardship imposed by subsection (a)

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27 While we are aware that *Young* and *Mitchell* are zoning cases, we consider that their holdings on economic impact are relevant in that, as is the statute at issue in this case, the regulations there were directed at competing concerns of public welfare rather than at the speech itself.

is too severe, an MSO is free to choose to comply with § 505 by time-channeling in accordance with subsection (b).

By including the time-channeling compliance option in § 505, Congress provided MSOs with decision-making flexibility and an economically less restrictive alternative. We thus find that the economic burden placed on MSOs by subsection (a) is not determinative of the result in light of the substantially less expensive option provided by time-channeling in subsection (b). It follows therefore that if the time-channeling alternative provides a constitutional means of compliance with § 505, then § 505 is constitutional.

Time-channeling was explicitly approved by the Supreme Court as a constitutional restriction on pervasive indecent speech in *Pacifica Foundation*. There, the Supreme Court found that one of the most troubling aspects of the Carlin broadcast was the early afternoon hour at which it was aired. Shown at that time, the broadcast was "'like a pig in a parlor instead of the barnyard.'" Pacifica Foundation, 438 U.S. at 750 (*quoting Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926)). The F.C.C. opinion challenged by the *Pacifica Foundation* did not intend to ban future indecent broadcasts entirely but merely sought to channel them into a safe-harbor period during which significant numbers of children would not be listening. *Id.* at 732 (citing 59 F.C.C.2d 892 (1976)). The Supreme Court held that time-channeling was an appropriate response to the problem presented. It therefore approved the F.C.C. attempt to prevent the airing of offensive programming on a pervasive form of communication at a time of day when children were likely to be listening.

Because the Supreme Court endorsed a time-channeling solution in very similar circumstances in *Pacifica Foundation*, we believe that time-channeling also survives constitutional scrutiny here. It is important to our reasoning that § 505 does not seek to ban sexually explicit programming, nor does it prohibit consenting adults from viewing erotic material on premium cable networks if they so desire. It is clearly established that a complete ban on indecent speech will rarely (if

ever) be tolerated. *See Denver Consortium*, 116 S. Ct. at 2387 (plurality opinion) (suggesting that § 10(a) passed constitutional muster in part because it gave a cable operator the flexibility to choose not to ban indecent broadcasts, but rather "to rearrange broadcast times, better to fit the desires of adult audiences while lessening the risks of harm to children); *id.* at 2423 (Thomas, J., concurring in part and dissenting in part) ("Certainly, under our current jurisprudence, Congress could not impose a total ban on the transmission of indecent programming."); *Sable Communications*, 492 U.S. at 127 (holding total ban on indecent telephone communications to be unconstitutional and distinguishing the time-channeling remedy approved in *Pacifica Foundation* on grounds that it "did not involve a total ban on broadcasting indecent material."); *Young*, 427 U.S. at 70 (finding that the First Amendment protects communication in the area of sexually oriented materials from total suppression). The time-channeling alternative in § 505 explicitly allows MSOs to continue transmitting sex-dedicated networks. Section 505 thus leaves the speaker and the listener with an opportunity to maintain sufficient adult communication, while respecting the privacy interests of those who might be offended or inappropriately exposed. We believe the law thus strikes a permissible balance of constitutional interests.

The plaintiffs contend, nevertheless, that § 504 is a less restrictive option which is available to provide protection from signal bleed. They urge, therefore, that we declare § 505 invalid. However, the cost to MSOs of creating an adequate shield from a widespread intrusion of signal bleed by supplying converter/ lockboxes to households that don't subscribe to adult channels, would be close to the expense of providing converter/lockboxes to non-subscribing households under § 505(a). The main difference is that under § 504 the household has to request the box, while under § 505 the MSO must

provide the box.[28] We have no evidence in the present record that local cable operators or producers of sexually explicit programming are advertising the free availability of the § 504 lockbox or other blocking devices upon demand. Likewise, there is no evidence that parents are otherwise aware of the § 504 means of achieving complete blocking of undesired channels. Upon this record, the government has demonstrated an expectation that § 504 will not be a viable alternative.

Moreover, in view of the fact that children watch television in the homes of their friends as well as in their own homes, we do not find Congress to have been unreasonable in wishing to extend protection from signal bleed beyond a child's own home.

Furthermore, Congress enacted, as one of the regulatory options, time channeling, which the Supreme Court had in *Pacifica Foundation* held to be an unconstitutionally acceptable way of protecting children from a pervasive, sexually explicit medium. Therefore, even if § 505(a) does not pass constitutional analysis, § 505(b) does.

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28 Plaintiffs also assert that Congress found, in § 551(a)(8) & (9) of the Act, that there is a compelling governmental interest in empowering parents to control the television viewing by their children, such as by providing parents with technological tools that allow them to easily block violent, sexual or other programming that they believe harmful to their children. Section 504 was one such mechanism, and the development of v-chip technology will be another. Congress recognized, as Senator Feinstein's remarks indicated, *supra*, that many parents are unaware of the problem of sexually explicit signal bleed and its accessibility to children of non-subscribers of sexually-dedicated channels. The parental control option is viewed as an adjunct of lesser efficacy because its exercise requires knowledge and the taking of affirmative steps such as requesting the blocking device from the MSO.

Given the content of adult programming and the pervasive nature of cable television, we find that § 505 is an acceptable governmental response intended to prevent exposure of minors to sexually explicit signal bleed. We therefore conclude that plaintiffs have failed to show that they are likely to succeed in their claim that the provision violates their First Amendment rights to freedom of speech.[29]

C. Fourteenth Amendment Equal Protection Jurisprudence

Likewise, plaintiffs have not persuaded us that they can succeed on the merits of their claim that § 505 violates their rights guaranteed by the Equal Protection Clause. Playboy and Graff argue that other premium channel networks carry adult-oriented programming but that § 505 will not restrict the speech of these networks. They claim, for example, that HBO and Showtime present programming that is an equivalent to the sexually oriented programming shown on the Playboy networks and on Spice, and that this programming is shown at hours outside of the safe-harbor period. They assert that legislation directed at them, but not at these other premium networks, denies them equal protection of the laws. See, e.g., *News America Pub., Inc. v. F.C.C.*, 269 U.S. App. D.C. 182, 844 F.2d 800, 813 (D.C. Cir. 1988) ("The safeguards of a pluralistic political system are often absent when the legislature zeroes in on a small class of citizens.") (citing *Railway Express Agency v. New York*, 336 U.S. 106 (1949)).

There is, however, a significant difference between plaintiffs' networks and the non-adult premium networks. The plaintiffs admit that all of the programming shown on their

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29 We are mindful that the Supreme Court in *Denver Consortium* referred to the Telecommunications Act of 1996, including specifically § 505, as "significantly less restrictive" than § 10(b) of the 1992 Cable Act which they struck down. See, e.g., 116 S. Ct. at 2392. However, since § 505 was not before the Court in *Denver Consortium*, this reference is dictum.

networks -- in some cases, twenty-four hours per day -- is "adult programming." Transcript of Preliminary Injunction Hearing 201-02 (D. Del. May 20, 1996) (testimony of Steven Saril, Senior Vice President of Sales and Marketing for Graff); see Deposition of Anthony J. Lynn, President of Playboy Entertainment Group, Inc. at 124-25 (Def.'s Ex. 72) (stating that sexually explicit programming aired on AdulTVision "is at risk of being defined as sexually explicit" under § 505); Plaintiff Graff Pay-Per-View Inc.'s Answers to Defendants' First Set of Interrogs. at 6 (Def.'s Ex. 43) (responding that 100% of Graff's programming contains material that is "sexually oriented"). On the premium channels, however, sexually explicit shows constitute only a fraction of the programming. For example, only one sixteenth of the programming on the non-adult cable channels on a Friday evening in Denver was sexually explicit. Moreover, many of the shows constituting that one-sixteenth were "R" rated movies with some sexually explicit scenes, rather than being 100% sexually explicit. Thus, it cannot be said that the non-adult channels, such as HBO and Showtime, are "primarily dedicated" to sexually explicit programming. Moreover, signal bleed from that one-sixteenth, if signal bleed occurred, would not continuously present sexually explicit scenes to the channel surfer.[30]

We find therefore that Congress was justified in initially addressing the problem of sexually explicit signal bleed by focusing on sex-dedicated networks. Section 505's "differential treatment" or plaintiffs' networks is justified by their "special characteristic" of providing nothing but sexually explicit programming intended for adult audiences. *See Turner Broadcasting*, 114 S. Ct. at 2468. It is perfectly logical that Congress would begin its attempt to prevent minors from gaining access

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30 We note also that § 505 applies uniformly and without discrimination to all networks that are "primarily dedicated to sexually-oriented programming." Pub. L. No. 104-104, § 505, 106 Stat. at *136 (1996) (emphasis added). The law does not, for instance, favor Playboy over Graff.

to programming intended solely for adults by focusing first on the networks that specialize in adult-only programming.

> "Congress need not deal with every problem at once, and Congress "must have a degree of leeway in tailoring means to ends." *Denver Consortium*, 116 S. Ct. at 2393 (majority opinion) (citing *cf. Semler v. Oregon Bd. Of Dental Examiners*, 294 U.S. 608, 610 (1935) and *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102-03 (1973)); *see also Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 489 (1955) ("Reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."); *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 434 (1993) (The Court does not "require that the Government make progress on every front before it can make progress on any front.").

We find that the means chosen by Congress to protect children and aid their parents was a permitted and measured response to a national problem. The cause of the problem was primarily traced to sex-dedicated networks and, understandably, Congress began its efforts to address the problem by focusing on those networks.[31] Congress thus made a logical

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31 Furthermore, this is not a case involving governmental discrimination against a suspect class, nor is there any evidence of arbitrary or invidious governmental conduct. *See, e.g., New York City Transit Authority v. Beazer*, 440 U.S. 568, 592-93, 59 L. Ed. 2d 587, 99 S. Ct. 1355 (1979). Therefore, we apply rational basis review and ask whether the alleged classification is "rationally related" to a "legitimate" government interest. In our discussion of First Amendment jurisprudence, supra, we applied a much higher standard of scrutiny and concluded that § 505 is constitutional. We therefore hold that § 505 is not merely rational-

(continued...)

distinction and tailored the law in an acceptable manner. As a result, plaintiffs' claim that § 505 will violate their right to equal protection of the laws is likely to fail.

D. Vagueness Jurisprudence

After the Supreme Court's decision in *Denver Consortium*, it is clear that plaintiffs' vagueness claim will also fail on the merits. Graff noted in its Memorandum of Law in support of its Motion for a Preliminary Injunction that "the Supreme Court has before it a similar vagueness challenge in the cable indecency case," citing *Denver Consortium*. At that time, argument had been heard by the Supreme Court in *Denver Consortium*, but the decision was pending. When the Supreme Court published its decision in that case, it flatly rejected the plaintiffs' argument that the provisions challenged were unconstitutionally vague. *Denver Consortium*, 116 S. Ct. at 2389-90. The Court concluded that similar terms had been previously defined by courts and by the F.C.C. It also found the language of the statute "similar to language previously used by this Court for roughly similar purposes," referring to its decision in *Miller v. California*, 413 U.S. 15, 24 (1973), among others. *Id.* at 2389. Thus, the use of accepted terms imbued the statute with meaning.

In recent decisions, other members of the federal judiciary have likewise found that the term "indecent" has, over time, been sufficiently defined. *See American Civil Liberties Union v. Reno*, 929 F. Supp. at 865, 868 (Dalzell, J., concurring); *Shea ex rel. American Reporter v. Reno*, 930 F. Supp. 916, 935-36 (S.D.N.Y., 1996). As pointed out recently by a three-judge panel in the United States District Court for the Southern District of New York, federal courts have approved the F.C.C.'s definition of "indecency" and have rejected vagueness challenges to that

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31(...continued)
ly related to a legitimate government interest, it is carefully tailored to an interest that is widely regarded as compelling.

term in the context of broadcast media, commercial telephone communications, and cable programming. *See Shea*, 930 F. Supp. at 935-36. The court in *Shea* comprehensively reviewed the precedent in this area, and we find their research and their reasoning persuasive.

Therefore, we conclude that § 505 does not suffer from the "vice of vagueness." The plaintiffs clearly understood that the law applied to them, and in the wake of this litigation, it is clear that the F.C.C. would apply § 505 to MSOs that carry the plaintiffs' networks. Thus, the meaning and application of § 505 should be plain to MSOs as well. Playboy and Graff have little-to-no chance of succeeding on the merits of a vagueness claim.

VI. Conclusion

Plaintiffs have not satisfied the elements of the preliminary injunction test. We will therefore remove the temporary restraining order, which was previously granted by this court, and we will deny plaintiffs request for preliminary injunctive relief.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PLAYBOY ENTERTAINMENT GROUP, INC.,
GRAFF PAY-PER-VIEW INC.,

Plaintiffs, **CONSOLIDATED ACTION**

v. Civil Action No. 96-94/96-107 JJF

UNITED STATES OF AMERICA,
UNITED STATES DEPARTMENT OF
JUSTICE, JANET RENO, Attorney
General, FEDERAL COMMUNICATIONS
COMMISSION,

Defendants.

TEMPORARY RESTRAINING ORDER

This 7th day of March, 1996 at 6:30 p.m., having considered Plaintiff Playboy Entertainment Group, Inc.'s Application for a Temporary Restraining Order,

THE COURT FINDS that:

(1) Plaintiff has demonstrated it is likely to succeed on the merits of its claim that Section 505 of the Telecommunications Act of 1996 violates the First Amendment of the United States Constitution;

(2) Plaintiff has demonstrated it will suffer irreparable harm unless injunctive relief is granted;

(3) Defendants and others will suffer no harm from the imposition of this Order; and

(4) the public interest supports this Order.

ACCORDINGLY, IT IS HEREBY ORDERED that Playboy Entertainment Group, Inc.'s Application is **GRANT-**

ED. The United States of America, the United States Department of Justice, Attorney General Janet Reno, the Federal Communications Commission, and all their officers, agents, servants, employees, attorneys, and anyone else acting in concert with them are hereby enjoined from enforcing or implementing Section 505 of the Telecommunications Act of 1996 in any manner.

Unless previously ordered by this Court, this Order shall remain in force only until the hearing and determination by the district court of three judges of Plaintiff's Motion for Preliminary Injunction.

/S/
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action Nos. 96-94 & 96-107-JJF
Consolidated Action

PLAYBOY ENTERTAINMENT GROUP, INC.,
GRAFF PAY-PER-VIEW INC.,
PLAINTIFFS,
v.
UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF JUSTICE, JANET RENO, ATTORNEY GENERAL, FEDERAL COMMUNICATIONS COMMISSION,
DEFENDANTS.

March 7, 1996, Decided

A. Gilchrist Sparks, III, Katherine R. Witherspoon, of MORRIS, NICHOLS, ARSHT & TUNNELL, Wilmington, Delaware. *Robert Corn-Revere, Jean S. Moore, Ronald J. Wiltsie, II*, of HOGAN & HARTSON L.L.P., Washington, D.C. *Burton Joseph*, of BARSY, JOSEPH & LICHTENSTEIN, Chicago, Illinois. Attorneys for Playboy Entertainment Group, Inc.

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Frank W. Hunger, Assistant Attorney General, *Gregory M. Sleet*, United States Attorney, *Patricia C. Hannigan*, Assistant United States Attorney, of UNITED STATES ATTORNEY'S OFFICE, Wilmington, Delaware. *Theodore C. Hirt, James J. Gilligan, Sarah L. Wilson*, of UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C. *Christopher J. Wright*, Deputy

General Counsel, *Daniel M. Armstrong*, Associate General Counsel, of FEDERAL COMMUNICATIONS COMMISSION, Washington, D.C. Attorneys for Defendants.

Joseph J. Farnan, Jr., *District Judge*

OPINION BY: Joseph J. Farnan, Jr.

OPINION: March 7, 1996
Wilmington, Delaware
Farnan, *District Judge*

I. INTRODUCTION

Presently before the Court is the Application for a Temporary Restraining Order filed by Playboy Entertainment Group, Inc. ("TRO") (D.I. 3).[1] Pursuant to Rule 65 of the Federal Rules of Civil Procedure, Playboy seeks to prevent Defendants the United States, the United States Department of Justice, Attorney General Janet Reno, and the Federal Communications Commission ("FCC")[2] from implementing or enforcing Section 505 of the Telecommunications Act of 1996 (the "Act")[3] pending a preliminary injunction

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1 Subsequent to the filing of the instant action, Graff Pay-Per-View, Inc. filed a similar action against Defendants. *See Graff Pay-Per-View v. Reno*, C.A. 96-107-JJF. Simultaneously with the filing of its Complaint, Graff filed an Unopposed Motion to Consolidate its action with the instant action. The Court entered an Order granting Graff's motion.

2 The Court will refer to the Defendants as the "Government."

3 Section 505 of the Telecommunications Act will be codified at 47 U.S.C.A. § 641.

hearing before a three-judge court.[4] Playboy contends that Section 505 of the Act violates the First Amendment and the Equal Protection Guarantee of the Fifth Amendment of the United States Constitution. The Government opposes the granting of a TRO on the grounds that Playboy has failed to satisfy the TRO standards necessary to bar the enforcement of an Act of Congress. (D.I. 21 at 3.) As provided in the Act, Section 505 becomes effective on March 9, 1996, 30 days after it was signed by the President.

The Court has jurisdiction over this matter pursuant to Section 561 of the Act. This Opinion shall constitute the Court's Findings of Fact and Conclusions of Law.

II. BACKGROUND

A. Section 505 of the Telecommunications Act of 1996

Section 505 provides in its entirety:

> SCRAMBLING OF SEXUALLY EXPLICIT ADULT VIDEO SERVICE PROGRAMMING.
>
> (a) REQUIREMENT. In providing sexually explicit adult programming or other programming that is indecent on any channel of its service primarily dedicated to sexually-oriented programming, a multichannel video programming distributor shall fully scramble or otherwise fully block the video and audio portion of such channel so that one not a subscriber to such channel or programming does not receive it.
>
> (b) IMPLEMENTATION. Until a multichannel video programming distributor complies with the requirement set forth in subsection (a), the distributor shall limit the access of children to the

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4 Section 561 of the Act requires that facial challenges to the Act's constitutionality must be heard by a district court of three judges empaneled pursuant to 28 U.S.C. § 2284.

> programming referred to in that subsection by not providing such programming during the hours of the day (as determined by the Commission) when a significant number of children are likely to view it.
>
> (c) DEFINITION. As used in this section, the term 'scramble' means to rearrange the content of the signal of the programming so that the programming cannot be viewed or heard in an understandable manner.

Section 505 requires a video programming distributor ("a cable operator") to scramble "sexually explicit adult programming or other programming that is indecent" which is transmitted on a channel "primarily dedicated to sexually oriented programming," often referred to as an "adult network." Section 505 requires that any such channel must be fully scrambled regardless of whether scrambling has been requested by the customer. If a cable operator does not or cannot comply with this "blocking requirement," it is prohibited from transmitting the adult channel programming during hours of the day when minors are most likely to view it. Section 505 provides that said hours shall be determined by the FCC.[5] Cable operators must be in full compliance with the Section 505 blocking requirements by March 9, 1996, or risk exposure to possible enforcement by the Government and resulting penalties.

B. History of Section 505

The Telecommunications Act of 1996, enacted on February 9, 1996, resulted from a Congressional effort spanning several years to restructure the telecommunications industry. Extensive debates and hearings were held by both

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5 See Order and Notice of Proposed Rulemaking amending 47 C.F.R. § 76 (F.C.C., effective March 9, 1996). By this action, the FCC has set the hours of 10 p.m. to 6 a.m. for adult programming as contemplated by Section 505. *Id.* at III.A.

the United States Senate and House of Representatives on numerous issues addressed by the Act, although no hearings were held with regard to the provisions of Section 505.

During the final days of Congress' consideration of the Telecommunications Act, Senator Diane Feinstein of California, on her behalf and on behalf of Senator Trent Lott of Mississippi, introduced Amendment 1269 which ultimately became Section 505 of the Act. Although Senator Feinstein spoke at length about the amendment at the time of its introduction, no hearing or debate was held, and the amendment was voted upon and passed the same evening as its introduction. 141 Cong. Rec. S8167 (daily ed. June 12, 1995).

Senator Feinstein, in addressing the Senate, stated that the blocking requirements required by the amendment were "rather simple and direct . . . [and] commonsense . . . ." The Senator asserted that such an amendment was needed despite other provisions of the Act that addressed similar concerns.[6] In support of this assertion, Senator Feinstein cited a communication she received from a local city councilman from Poway, California, a suburb of San Diego, who told the Senator that 320,000 cable customers in the Poway area were receiving unscrambled and sexually explicit audio and video cable programming although they had not subscribed to it. Senator Feinstein observed that the Poway experience was not an isolated incident. The Senator noted that in Washington, D.C., unscrambled sexually explicit pornography had been transmitted to non-subscribing cable customers. Although the Senator acknowledged that the National Cable Television Association had adopted guidelines concerning such transmissions (see

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6 Specifically, Section 504 of the Act requires that "upon request by a cable service subscriber, a cable operator, shall, without charge, fully scramble or otherwise fully block the audio and video programming of each channel carrying such programming so that one not a subscriber does not receive it." Section 504(a).

Aff. D. Brenner ¶ 4), the Senator found that these endeavors were insufficient:

> The problem is that there are no uniform laws or regulations that govern such sexually explicit adult programming on cable television. Currently, adult programming varies from community to community, as does the amount and effectiveness of scrambling on each local cable system. Right now, it is up to the local cable operator to monitor itself. This is like the fox guarding the hen house . . . . the voluntary guidelines simply recommend that local cable operators "block the audio and video portions of unwanted sexually-oriented premium channels at no cost to the customer, upon request." While this is a somewhat commendable effort on the part of the industry, I do not think it goes far enough * * * *
>
> I do not believe that sexually explicit adult programming should automatically be broadcast into a program subscriber's home. On the contrary, I believe that sexually explicit programming should be automatically blocked, unless a program subscriber specifically requests the programming.

In response to the cable industry's concerns about technology problems and extraordinary fiscal costs that the amendment would impose on them, Senator Feinstein advised:

> The bottom line, however, is that fully scrambling both the audio and video portion of a cable program is technologically feasible . . . . With regard to their fiscal concerns, I have never been given any information from the industry to document what the actual costs to cable operators would be.

Senator Feinstein concluded that the amendment gave cable operators options, and the fact that the operators had 30 days to comply gave them ample time:

> . . . the amendment leaves it up to the local cable operator on how and when to come into full compliance . . . .

This amendment also does not become effective until 30 days after enactment, so cable operators will have plenty of time to either fully block the programming, or restrict access to certain times of the day. *Id.*

Senator Lott, addressing the Senate after Senator Feinstein, emphasized that he did not "want to exaggerate what this amendment will do. It simply requires cable operators to fully scramble sexually explicit programming if someone has not subscribed for such programming." *Id.* at S8169.

Attached to the legislative record, although apparently not discussed on the floor, is a memorandum from a legislative attorney for the American Law Division of the Congressional Research Service, Library of Congress, which opined as to the constitutionality of the proposed amendment. *Id.* at S8168. The legislative attorney reviewed current legal standards concerning restrictions on cable television. He concluded that the amendment was constitutional; however, he cautioned that the phrase "during hours of the day (as determined by the Commission) when children are most likely to view it" could be found to be overly broad, noting that this provision might have to be modified to "prohibit such programming when the ratio of children to adults is significantly high." *Id.*

The amendment passed by a unanimous vote.

C. The Fundamentals of Cable Television Programming

Cable television is a service that presently can provide cable customers with a choice of over 100 channels of pro-

gramming. Unlike broadcast television,[7] cable television is available only to those customers who choose to pay for it. Subscribers may choose from several available "packages." For example, "basic" cable service generally includes several broadcast stations, their local affiliates, and additional channels such as the Discovery channel, A&E television, CNN and C-Span. Customers may choose other "premium" packages which provide additional programming channels, such as HBO/Cinemax, Showtime/The Movie Channel and Playboy Television. Additionally, many cable system operators offer Pay-Per-View programming, in which subscribers may view a certain movie at a certain time on their television for a set fee.

The technology involved in cable television is fairly straightforward. Signals from various sources such as master antennas, satellites, or local television studios are received by the cable operator and then transmitted by the cable operator from its facility to customers' houses. The cable operator transmits the signals to customers through coaxial cable. (Aff. Ciciora ¶ 5.)[8]

From the inception of cable television systems, coaxial cables have provided the capacity to carry many more channels of television programming than can be provided by broadcast television channels. (Aff. Ciciora ¶ 6.) For example, because of interference from stations operating on the same channel in other communities and from stations operating on adjacent channels in the same community, the number of broadcast channels available over the airways in one community could not exceed seven (as in New York City)

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7 Broadcast television uses a signal received by household antenna via airwaves.

8 Walter S. Ciciora was Vice President, Technology, Time Warner Cable from 1989 to 1993, and in that capacity was primarily responsible for cable technology matters. (Aff. Ciciora P 2)

and rarely exceeded three or four. Because cable systems did not use the airwaves, they did not experience channel interference problems and therefore could transmit programming over their entire 12-channel capacity. (Aff. Ciciora ¶ 7.) With the advent of satellite-delivered programming, cable systems began to expand the capacity of their coaxial transmission facilities to 36, 54 and even 100 channels.

As more households subscribed to cable television and more cable systems increased their channel capacity beyond the 12 channels, television set manufacturers began making "cable-ready" or "cable-compatible" television sets. These sets are capable of directly tuning the nonbroadcast channels typically used by cable systems. Cable subscribers who own cable ready television sets do not need converter devices to tune those channels, unless the audio or video signals are scrambled by the cable system. (Aff. Ciciora ¶ 9.)

D. Practical and Technical Difficulties with Compliance Under Section 505 as Alleged by Playboy

Playboy acknowledges that scrambling and other technologies exist to comply with the provisions of Section 505; however, it asserts that the existing options either fail to fully block the non-subscribed programming or are impossible to install by March 9, 1996.

According to Playboy, all existing cable operators employ technology to protect their premium and pay-per-view channels ("premium services") so that only paid subscribers will be able to receive and view those channels. (Aff. Ciciora ¶ 10.) This technology takes one of three forms and is intended to prevent the audio or video signals of the cable channels from being seen or heard by non-subscribers. These three methods are the installation of: 1) a "scrambler"; 2) a "trap" or a "parental lockout feature ("lockbox")" or 3) substituted video/audio with lockbox. (Aff. Ciciora ¶¶ 11, 16, 22.)

The first option, scrambling, prevents video transmission of the non-subscribed channels, but fails to prevent audio

transmission unless additional technology, called "mapping" is used. Scrambling is the implementation of any of a variety of means employed at the "headend" or cable system transmission facility (to distinguish between devices employed at the individual household level) that alters a portion of the television signals so that the picture on the receiving television is impaired. Subscribers to premium networks receive a converter/descrambler (commonly called an 'addressable converter") that has the ability to descramble the video alterations and restore the picture. (Aff. Ciciora ¶ 11.) While the audio portion of a signal can also be scrambled at the headend, most manufacturers of scrambling equipment manufacture only headend equipment and converter boxes capable of scrambling and descrambling video, not audio signals. Consequently, the audio portion of a signal is rarely, if ever, scrambled at the headend. (Aff. Ciciora ¶ 12.)

Thus, when used alone, scrambling fails to suppress the audio of the unwanted channels (absent the use of mapping converters). In addition, scrambling can also fail to prevent the bleeding of the unwanted video signal of adult channels onto the television screens of "basic" programming customers. To prevent this bleeding of non-subscribed programming to the screens of basic customers, cable operators can utilize a "trap" or "lockbox" option.

A "trap" is a piece of hardware that is installed on the cable line coming into a basic programming customer's house. A "negative" trap removes or filters a designated channel signal from a group of incoming channel signals. In the alternative, a converter/ descrambler or a lockbox containing traps or filters can be installed on all customers' televisions and VCRs. (Aff. Ciciora ¶ 16.)

Finally, cable operators can prevent cable customers from receiving non-subscribed programming by the use of newer versions of converter/descramblers which substitute alternative video and audio for the scrambled signal. These devices are referred to as a lockbox and permit a parent, through the use of a parental key or personal identification

number, to block a television set from receiving the audio or video signal from any selected channel. This technology costs approximately $115.

Playboy offered the testimony of Wayne Hall, Vice President of Harron Communications Corporation ("Harron") to establish the difficulties facing a cable operator seeking to comply with Section 505. By affidavit, Mr. Hall testified that Harron has 245,000 cable subscribers in a seven-state area, approximately 123,000 of which have addressable converter/ descramblers. Harron provides all its subscribers, upon request, with a converter/descrambler having a parental lockbox feature. Although Harron rarely receives complaints about the bleeding of audio or video signal from any premium channel, in order to comply with Section 505 Harron would have to provide blocking devices to approximately 122,000 households that do not presently have them. With only one installer for every 2,500 customers, Mr. Harron testified that it would be impossible for Harron to install blocking devices on those households without a lockbox within any 30 day period, let alone by March 9th. Thus, according to Playboy, if Section 505 is implemented, the only economically viable solution for Harron would be to remove its adult oriented programming except for the late-night hours designated by the FCC for such programming. (Aff. Hall ¶¶ 1-10.)

E. Description of The Playboy Networks

Playboy produces and distributes cable video programming through its two programming networks, Playboy Television and AdulTVision ("the Playboy networks"). The Playboy networks are provided only to adult cable subscribers and only upon request. Playboy also produces and/or licenses, on an exclusive or non-exclusive basis, its programming for use on other major premium networks such as Showtime/The Movie Channel and HBO/ Cinemax. According to Playboy, it is not uncommon for the same programming to be shown by both Playboy Television and other non-adult oriented premium or Pay-Per-View

networks such as Showtime/The Movie Channel, HBO/Cinemax, Viewer's Choice/Hot Choice, or Action Pay-Per-View. (Aff. Lynn ¶¶ 4, 6, 10-12.)[9]

In addition, Playboy asserts that Playboy Television offers a wide variety of programming, consisting of lifestyle information, news, music, video fiction and short stories, comedy, and other programming that is not sexually explicit. In addition to its regular programming, Playboy contends that Playboy Television provides special programming such as its recent December 1, 1995 four-hour programming on AIDs awareness and safe sexual practices which was done in connection with the World AIDS Day created by the World Health Organization in 1988. (Aff. Lynn ¶ 9.)

Playboy states that it has standards and guidelines it uses in determining what programming will be suitable for the Playboy networks. Playboy contends that its standards and guidelines are designed to eliminate any material that can be deemed patently offensive. In order to implement its standards Playboy employs' four in-house lawyers who allegedly review all Playboy programming to ensure that it is neither obscene nor violative of any community standards. (Aff. Lynn ¶ 14.)

Playboy asserts that no court or administrative agency in any jurisdiction has ever found the Playboy networks or any of their programming to be either obscene or harmful to minors. Similarly, Playboy contends, in over forty years of publication, not one issue of Playboy magazine has ever been found to be obscene or harmful to minors by any judicial or administrative system, state or federal. In support of this contention Playboy notes that the United States Attorney General's Commission on Pornography concluded that

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9 Anthony J. Lynn is President, Playboy Entertainment Group and Executive Vice President, Playboy Enterprises. (Aff. Lynn P 1.)

Playboy magazine is "plainly non-offensive." (Aff. Lynn ¶ 15.)

III. PARTIES' CONTENTIONS

In this litigation, Playboy contends that it is entitled to a TRO against the implementation and enforcement of Section 505 the Act. Playboy contends that it is likely to succeed on the merits of the case, because: (1) the First Amendment forbids the application of indecency regulations to television programming (D.I. 7 at 18); (2) the Government has not established any compelling governmental interest in support of Section 505 (D.I. 6 at 29); (3) the requirements imposed by Section 505 are content-based and are accordingly unconstitutional (D.I. 7 at 31); and (4) Section 505 does not constitute the least restrictive means of serving the Government's interest (D.I. 7 at 40). In addition, Playboy contends that it will suffer irreparable injury if the Defendants are not enjoined (D.I. 7 at 48), that the balance of interest between the parties supports the issuance of a TRO (D.I. 7 at 50) and, finally, that the public interest supports the issuance of a TRO (D.I. 51).

In response, the Government contends that Playboy has failed to meet the standard required to enjoin the implementation of an Act of Congress. First, the Government argues that an Act of Congress cannot be enjoined absent a showing of compelling circumstances, and that in order for temporary injunctive relief to be granted, the Court must conclude that each of the four factors considered when ruling on a TRO weigh in favor of the plaintiff, which the Government contends Playboy cannot do. (D.I. 26 at 11.) The Government further contends that Playboy cannot establish that it has a likelihood of success on the merits because: (1) the Government has the authority to restrict access by children to indecency in cable television (D.I. 26 at 13); (2) Section 505 is supported by the Government's compelling interest in protecting minors from indecent televisions programming (D.I. 26 at 17); (3) Section 505 employs the least restrictive means available to further the

Government's interests, in that other courts have upheld similar blocking and time-channelling including positive traps. Further, the Government argues that voluntary measures are ineffective, and Section 505 is not a prior restraint on free speech (D.I. 20-28); (4) Section 505 is neither vague nor overbroad (D.I. 26 at 28); and (5) Section 505 does not impermissibly discriminate against indecent programming on channels dedicated to sexually explicit programming (D.I. 26 at 32).

The Government also asserts that Playboy cannot meet the standard for a TRO because Playboy has not carried its burden of establishing irreparable harm. (D.I. 26 at 36.) Finally, the Government contends that the harm to the Government, and the public interest, outweighs Playboy's assertions of harm. (D.I. 26 at 42.)

IV. LEGAL STANDARD OF REVIEW

Four factors must be considered when ruling on a motion for temporary injunctive relief. Those factors are: 1) the likelihood that the applicant will prevail on the merits; 2) the extent of irreparable injury to the applicant as a result of the conduct complained of; 3) the extent of irreparable harm to the defendant if temporary injunctive relief is granted; and 4) the public interest. *Clean Ocean Action v. York*, 57 F.3d 328, 331 (3d Cir. 1995); *S&R Corp. v. Jiffy Lube Int'l*, 968 F.2d 371, 374 (3d Cir. 1992). In order to grant an application for a temporary restraining order, the Court must conclude that each of the four factors weighs in favor of granting temporary injunctive relief. *Id.*

V. DISCUSSION

A. The Likelihood That Playboy Will Prevail on the Merits

1) Constitutional Standard of Review

The parties have agreed that at this juncture the strict scrutiny standard of constitutional review applies to

Playboy's facial challenge to Section 505.[10] The focus of a strict scrutiny review of an Act of Congress is to determine whether or not the legislation, in this case, Section 505 represents the least restrictive means of achieving the Government's interest. In this case, the Government's interest is to ensure that minors do not have access to non-subscribed adult programming on cable television. With this standard in mind, the Court will proceed to determine whether Playboy has met its burden to demonstrate that it is likely to succeed on the merits with regard to its assertion that Section 505 is unconstitutional.

2) Analysis of the Likelihood of Success on the Merits

After considering the record evidence and arguments presented by the parties, the Court concludes that Playboy has raised serious and substantial questions as to whether the blocking and FCC time requirements imposed on cable operators by Section 505 of the Telecommunications Act of 1996 constitute the least restrictive means of achieving the Government's interest in regulating the accessibility of adult programming to minors. Playboy has established that Section 505 may unconstitutionally infringe upon its rights under the First Amendment. At this stage of the proceedings, the Court credits Playboy's assertion that substantially less restrictive means are available to serve the Govern-

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10 In general, sexual expression which is indecent, but not obscene, is protected by the First Amendment to the United States Constitution. *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126, 106 L. Ed. 2d 93, 109 S. Ct. 2829 (1989). However, indecent speech may be regulated by the Government in order to promote a compelling interest, provided that the Government chooses the least restrictive means to further its articulated interest. *Id.* The least restrictive means will further the Government's interest through narrowly tailored regulations which do not unnecessarily interfere with First Amendment freedoms. *Id.*

ment's purpose. For instance, Playboy's suggestion that the lockbox technology supplied by cable operators to customers who request it can be an effective and reasonable alternative to the methods dictated by Section 505.

Further, the Court concludes that implementation and enforcement of Section 505 may effectively force cable operators to air Playboy only after 10 p.m. Importantly, such action could occur in the absence of any examination of alternative means, either by Congress or through discovery in this litigation. Because of the obvious importance of First Amendment guarantees, at a minimum, the Court is convinced that further investigation is needed to properly examine the Playboy programming and the feasibility of using alternative technologies prior to permitting the implementation of Section 505.

Although this Court has addressed in a limited manner the merits of this litigation and found a likelihood of success has been demonstrated by the Plaintiff, the Court trusts that the parties understand that a full consideration of the constitutional questions presented here can only be addressed by the three-judge court empaneled to hear this matter.

3. Irreparable Harm

While the judicial power to stay an act of Congress is "an awesome responsibility calling for the utmost circumspection", *Heart of Atlanta Motel v. United States*, 13 L. Ed. 2d 12, 85 S. Ct. 1, 2 (1964) (Black, J., in chambers), the judiciary's responsibility to enforce the First Amendment's express right of free speech is no less important. Accordingly, the United States Supreme Court has held that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Although a plaintiff does not establish irreparable harm simply by asserting a First Amendment violation, the Court of Appeals for the Third Circuit has held that the requisite harm is established where the plaintiff shows that an act of Congress has "a chilling effect on free expression." *American Civil Liberties Union, et*

al., v. Reno, No. CIV. A. 96-963, 1996 WL 65464 (E.D. Pa. Feb. 15, 1996), citing *Hohe v. Casey*, 868 F.2d 69, 72 (3d Cir. 1989).

Based on the evidence before it, the Court concludes that Playboy has shown that implementation of Section 505 will have a "chilling effect" on the adult-oriented cable television industry. Through the submission of affidavits from industry executives, Playboy has shown that adult-oriented cable television will effectively be turned off upon the implementation of Section 505. In the Court's view, Playboy has established that the short, 30 day implementation period provided for in Section 505 does not allow adequate time for cable companies to acquire and install the required blocking devices. Additionally, record evidence establishes that the cost of installing such devices in every home which subscribes to cable television would be crippling to the cable companies. Furthermore, Playboy has adduced evidence that upon implementation of Section 505 many cable operators who carry Playboy programming will be forced to curtail their transmission of the adult programming to the FCC imposed hours of 10:00 p.m. to 6:00 a.m. The Court is persuaded that such a substantial reduction of viewing time will cause significant financial losses for both the cable companies and Playboy.

Conversely, the Court concludes that the Government has not established that irreparable harm to the Government's interest will result if temporary injunctive relief is granted. Although not required, there is an absolute void of legislative findings that Section 505 is necessary to protect minors from exposure to sexually oriented material shown on adult cable channels which their parents have chosen not to subscribe to. While it is undisputed that video and audio signals of adult programming channels occasionally bleed into the homes of nonsubscribers, the legislative record contains no findings as to how often this bleeding occurs, how many minors are exposed to the adult programming when the bleeding occurs or what effect such exposure has on minors.

As a result, based on the evidence presented the Court concludes that Playboy has established that denial of temporary injunctive relief will have a chilling effect on the adult-oriented cable television industry. Therefore, the Court concludes that the irreparable harm that Playboy will suffer if temporary injunctive relief is denied substantially outweighs any harm the Government will suffer if temporary injunctive relief is granted.

4. The Public Interest

The Court is also persuaded that Playboy has established that the public interest will not be negatively affected if temporary injunctive relief is granted and that maintaining the status quo will not harm the public interest. The contention of the Government that the public interest will be negatively affected if relief is granted is unpersuasive.

The dilemma of how to effectively shield minors from adult programming is not novel; it has existed for at least a decade. Accordingly, several protective methods are already in place in the cable television industry to permit subscribing parents to completely block out adult programming signals they feel are inappropriate. These protective measures, which include converters and lockboxes, completely eliminate the bleeding problem and are available upon request to cable customers. At this stage of the proceedings, the Court is convinced that these devices are sufficient to provide cable customers with adequate protection until the parties are able to fully litigate the constitutional issues that are beyond the scope of this preliminary proceeding. Thus, the Court concludes that even if the Government has a compelling interest in shielding minors from adult programming, given the length of time the problem has existed and the protective devices already in place, the public interest does not override the irreparable harm that will be suffered by Playboy and the adult-oriented cable television industry if temporary relief is not granted.

5. Balancing of Hardships

The balancing of hardships ensures that the imposition of an injunction preserving the status quo will not harm the Government more than Playboy. *See Opticians Assoc. of America v. Independent Opticians of America*, 920 F.2d 187, 196 (3d Cir. 1990). The Court has concluded that the potential harm to Playboy absent the issuance of a TRO is substantial. On the other hand, the Court is persuaded that the harm to the governmental interest is minimal. Maintenance of the status quo will mean that parents can continue to block programming on their own or by requesting blocking services from their local cable operator. Although some bleeding or audio breakthrough may continue to occur during the duration of the TRO, the Government could not articulate what impact such occurrences might have on the target of the Government's announced interest [i.e., minors].[11] Accordingly, the Court concludes that the balance of hardships tips strongly in Playboy's favor.

III. CONCLUSION

For the reasons discussed, the Court concludes that Playboy has met its burden on the relevant factors needed to obtain temporary injunctive relief. Specifically, Playboy has shown a likelihood of success on the merits, irreparable harm if relief is denied, that the Government will not be irreparably harmed if relief is granted and that granting of relief will not adversely affect the public interest. In sum, the Court concludes that a balancing of all the relevant factors weighs in favor of granting temporary injunctive relief.

An appropriate Order will be entered.

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11 From the record evidence presented at this time, the Court infers that the content of the audio signal that may be heard is akin to the utterances of actress Meg Ryan during her performance in the diner scene in the movie When Harry Met Sally.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action Nos. 96-94 & 96-107-JJF

Consolidated

PLAYBOY ENTERTAINMENT GROUP, INC.
AND GRAFF-PAY-PER-VIEW INC.,
PLAINTIFFS

v.

UNITED STATES OF AMERICA, UNITED STATES
DEPARTMENT OF JUSTICE, JANET RENO,
ATTORNEY GENERAL, AND THE FEDERAL
COMMUNICATIONS COMMISSION,
DEFENDANTS.

ORDER

This 5th day of December, 1996, the Court having reviewed the submissions of the parties in support of and in opposition to plaintiff Playboy Entertainment Group, Inc.'s Motion to Stay Enforcement of Section 505 of the Telecommunications Act of 1996 During Pendency of Appeal to the United States Supreme Court, and plaintiff Graff Pay-Per-View, Inc.'s Motion for an Injunction Pending Appeal,

IT IS ORDERED that any enforcement of Section 505 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) is stayed during the pendency of the appeal of this consolidated action to the Supreme Court of the United States.

/S/JANE R. ROTH, United States Circuit Judge

/S/JOSEPH J. FARNAN, JR., U.S. District Judge

/S/JEROME B. SIMANDLE, U.S. District Judge

SECTIONS 504 AND 505 OF THE COMMUNICATIONS DECENCY ACT

The Communications Decency Act of 1996, enacted as Title V of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 136, provides in pertinent part as follows:

TITLE V – OBSCENITY AND VIOLENCE

* * * * *

SEC. 504. SCRAMBLING OF CABLE CHANNELS FOR NONSUBSCRIBERS.

Part IV of title VI (47 U.S.C. 531 et seq.) is amended by adding at the end the following:

"SEC. 640. SCRAMBLING OF CABLE CHANNELS FOR NON SUBSCRIBERS.

"(a) SUBSCRIBER REQUEST. – Upon request by a cable service subscriber, a cable operator shall, without charge, fully scramble or otherwise fully block the audio and video programming of each channel carrying such programming so that one not a subscriber does not receive it.

"(b) DEFINITION. – As used in this section, the term 'scramble' means to rearrange the content of the signal of the programming so that the programming cannot be viewed or heard in an understandable manner.".

SEC. 505. SCRAMBLING OF SEXUALLY EXPLICIT ADULT VIDEO SERVICE PROGRAMMING.

(a) REQUIREMENT. – Part IV of title VI (47 U.S.C. 551 et seq.), as amended by this Act, is further amended by adding at the end the following:

"SEC. 641. SCRAMBLING OF SEXUALLY EXPLICIT ADULT VIDEO SERVICE PROGRAMMING.

"(a) REQUIREMENT. – In providing sexually explicit adult programming or other programming that is indecent on any channel of its service primarily dedicated to sexually-oriented programming, a multichannel video programming distributor shall fully scramble or otherwise fully block the video and audio portion of such channel so that one not a subscriber to such channel or programming does not receive it.

"(b) IMPLEMENTATION. – Until a multichannel video programming distributor complies with the requirement set forth in subsection (a), the distributor shall limit the access of children to the programming referred to in that subsection by not providing such programming during the hours of the day (as determined by the Commission) when a significant number of children are likely to view it.

"(c) DEFINITION. – As used in this section, the term 'scramble' means to rearrange the content of the signal of the programming so that the programming cannot be viewed or heard in an understandable manner.".

(b) EFFECTIVE DATE. – The amendment made by subsection (a) shall take effect 30 days after the date of enactment of this Act.

INTERIM REGULATIONS IMPLEMENTING SECTION 505

Part 76 of Title 47 of the Code of Federal Regulations is amended to read as follows:

PART 76--[AMENDED]

§ 76.227 -- Blocking of indecent sexually-oriented programming channels.

(a) In providing sexually explicit adult programming or other programming that is indecent on any channel of its service primarily dedicated to sexually-oriented programming, a multichannel video programming distributor shall fully scramble or otherwise fully block the video and audio portion of such channel so that one not a subscriber to such channel or programming does not receive it.

(b) Until a multichannel video programming distributor complies with the requirement set forth in paragraph (a) of this section, the multichannel video programming distributor shall not provide the programming referred to in paragraph (a) of this section between the hours of 6 a.m. and 10 p.m.

(c) Scramble means to rearrange the content of the signal of the programming so that the programming cannot be viewed or heard in an understandable manner.

(d) Sexually explicit adult programming or other programming that is indecent means any programming that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable or other multichannel video programming distribution medium.

Supreme Court U.S.
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Nos. 96-1034 and 96-1108

In the Supreme Court of the United States

OCTOBER TERM, 1996

PLAYBOY ENTERTAINMENT GROUP, INC., APPELLANT
v.
UNITED STATES OF AMERICA, ET AL.

SPICE ENTERTAINMENT COMPANIES, INC., APPELLANT
v.
JANET RENO, ATTORNEY GENERAL, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

MOTION TO AFFIRM

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QUESTION PRESENTED

Section 505 of the Communications Decency Act of 1996, Pub. L. No. 104-104, Tit. V, § 505, 110 Stat. 136 (1996), requires that a cable television operator "providing sexually explicit adult programming or other programming that is indecent on any channel of its service primarily dedicated to sexually-oriented programming" either "fully scramble or otherwise fully block the video and audio portion of such channel so that one not a subscriber * * * does not receive it," or, alternatively, not provide that programming "during the hours of the day (as determined by the [Federal Communications] Commission) when a significant number of children are likely to view it."

The question presented is whether the district court abused its discretion in refusing to grant appellants a preliminary injunction precluding implementation and enforcement of Section 505.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1034

PLAYBOY ENTERTAINMENT GROUP, INC., APPELLANT

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UNITED STATES OF AMERICA, ET AL.

No. 96-1108

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v.

JANET RENO, ATTORNEY GENERAL, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

MOTION TO AFFIRM

OPINIONS BELOW

The opinion of the district court denying a preliminary injunction (J.S. App. 1a-40a)[1] is reported at 945 F. Supp. 772. A previous opinion of the district court

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[1] References to "J.S. App." are to the Appendix to the Jurisdictional Statement in No. 96-1034.

granting a temporary restraining order is reported at 918 F. Supp. 813.

JURISDICTION

The order of the district court denying a preliminary injunction was entered on November 8, 1996. The notice of appeal in No. 96-1034 was filed on November 8, 1996. The notice of appeal in No. 96-1108 was filed on November 12, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

STATEMENT

Appellants are firms that provide "virtually 100% sexually explicit" programming (J.S. App. 8a) for transmission by cable operators (also referred to as "multisystem operators" or "MSOs") to premium subscribers who seek such programming. They sought a preliminary injunction, as well as permanent declaratory and injunctive relief, against the implementation and enforcement of Section 505 of the Communications Decency Act of 1996, Pub. L. No. 104-104, Tit. V, 110 Stat. 136. That statute requires cable operators carrying cable channels "primarily dedicated to sexually-oriented programming," *ibid.*, to take steps to ensure that those who do *not* subscribe to those channels will not receive intelligible audio or video signals from those channels at a time when children are likely to be viewing. The cable operator either must make intelligible audio and video signals from those channels generally unavailable to nonsubscribers, or the operator must broadcast the channels only at times of day when significant numbers of children are unlikely to be viewing. Appellants have taken these appeals from the district court's refusal to grant them a preliminary injunction against implementation or enforcement of the statute.

1. Approximately 62 million households nationwide receive cable television. J.S. App. 12a. Cable subscribers typically are offered a "basic" package of channels for a monthly fee, but they also may subscribe at an additional monthly fee to "premium" channels that provide sports programming, recently released movies, or sexually explicit adult entertainment. *Id.* at 7a. Cable subscribers may also order premium programming on a pay-per-view basis, permitting the subscriber access to a particular movie or sporting event for a specified additional fee. *Ibid.*

To ensure that subscribers who have not paid for premium programming are not able to view it, most cable operators "scramble" the programming at their central transmission facility (the "headend"), using either "RF" or "baseband" technology. Such scrambling may render the video portion of the picture completely unintelligible to those who do not subscribe to the premium programming, or it may merely make the picture jump and roll, while leaving images on the screen discernible. The cable operator provides subscribers who are authorized to receive the premium channel a set-top device, called a converter (or converter/descrambler), which is connected between the subscriber line and the television set to counteract the scrambling and permit clear reception of the channel. RF scrambling does not affect the audio portion of the signal. As a result, the audio portion can be heard on all subscribers' television sets at all times. J.S. App. 8a-9a & nn. 11-12. Modern baseband scrambling may make the audio signal unintelligible, but prior generations of baseband scrambling may leave it unimpaired. Kramer Decl., ¶¶ 15, 23-25, 43-44; Jackson Decl., ¶¶ 21-22.

The limitations of these scrambling systems give rise to what is known as "video and audio bleed" or simply

"signal bleed." In any system where premium programming is carried, all subscribers receive the scrambled signal of each premium channel. As a result, insofar as the video or audio signal of a premium channel is not completely scrambled, those who do not subscribe to the channel will be able to receive some or all of the video or audio signal. That is true not only for subscribers who have cable-ready televisions that can be directly connected to the subscriber line, but also for subscribers whose televisions are connected by set-top converters (other than sets connected to "mapping" converters that completely block both audio and video signals from channels to which the homeowner does not subscribe). J.S. App. 10a-11a. Signal bleed is a particular problem with sexually explicit adult programming, because it allows some or all of the video and audio to be seen and heard on the televisions of tens of millions of cable subscribers who do not subscribe to such programming and is, therefore, available to their children. *Id.* at 11a-12a.

2. When Congress enacted Section 505, it was "aware that some cable systems [were] permitting 'adult' programs that [were] clearly unsuitable for children to be received in the home without sufficient scrambling." S. Rep. No. 367, 103d Cong., 2d Sess. 103 (1994). As Senator Feinstein, one of the sponsors of Section 505, commented, "[p]arents * * * come home after work only to find their children * * * watching or listening to the adult's-only channel, a channel that many parents did not even know existed." 141 Cong. Rec. S8167 (daily ed. June 12, 1995). As an example, she referred to the fact that a "partially scrambled pornography signal was broadcast only one channel away from a network broadcasting cartoons and was easily accessible for children to view." *Ibid.*

Congress's concerns were triggered by complaints from across the country. For example, Mr. Anthony Snesko had made 550 copies of a videotape showing the Spice Channel—one of the channels operated by appellant in No. 96-1108—as it appeared on his television at 9:00 a.m. in the morning sometime in April or May, 1994, and had distributed a copy to every member of the House and Senate. Snesko Decl., ¶ 12.[2] In December 1995, a mother from Cape Coral, Florida, complained to her congressman that she had recently found her eight-year-old son, seven-year-old daughter, and a playmate watching Spice at 4:00 in the afternoon, "transfixed" by scenes of "a naked man sodomizing a woman" together with the "groans and epithets that go along." DX 14.[3] In 1993, Senator Biden urged the Federal Communications Commission to review a cable company's compliance with federal law after large numbers of Delaware residents voiced objections about unwanted reception of Spice. DX 31. See also, *e.g.*, DX's 17, 19, 29 (constituent letters

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[2] The videotape shows a scene in which a man performs oral sex on a woman. The video images, while partially scrambled, are discernible. The audio contains four-letter words and vulgar references to sexual organs. DX 1.

[3] The district court received other evidence of partially scrambled transmissions by Playboy and Spice. For example, Defendants' Exhibit 4 contains partially scrambled scenes videotaped from the Playboy Channel in Orange, California. Harris Decl., ¶ 5. The scenes depict "images of a nude woman caressing herself and then of two nude women in the water and in a boat, caressing each other." J.S. App. 12a. Defendants' Exhibit 5 is an audio tape of the Spice Channel in early 1994 in the Oxnard, California home of a non-Spice subscriber. Allen Decl., ¶ 5. The tape contains "the sounds of what appear to be repeated sexual encounters accompanied by assorted orgiastic moans and groans." J.S. App. 12a.

complaining about inadequately scrambled "sex channels" and their availability to children).[4]

In her floor statement, Senator Feinstein acknowledged that Congress could require cable operators to provide complete blocking of audio and video signals on request of a subscriber—an approach Congress ultimately adopted and included in Section 504 of the Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 136. But Senator Feinstein observed that that proposal did not "go[] far enough," insofar as it would "put the burden of action on the subscriber * * * by requiring a subscriber to specifically request the blocking of indecent programming." 141 Cong. Rec. S8167 (daily ed. June 12, 1995) (statement of Sen. Feinstein). She explained that Section 505, by mandating scrambling of both the audio and video portions of indecent programming on adult-oriented networks, would not require cable operators to do anything other than what the industry was already capable of and, in fact, was already doing in some communities. *Ibid.*

3. Section 505 became law on February 8, 1996, when the President signed the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. As enacted, Section 505 provides that, "[i]n providing sexually explicit adult programming or other programming that is indecent on any channel of its service primarily dedi-

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[4] The record in this case reflects the ease with which children have access to less than fully scrambled adult programming. Mr. Snesko's nephew, for example, knew how to disconnect a television set from the converter box in order to watch Spice, even though the boy's father did not even know that Spice could be received in the house. Snesko Decl., ¶ 3. In Rock Island, Illinois, junior high school children discovered that they could watch the Spice Channel after school long before the adult community became aware that Spice was not fully scrambled. Mahlo Decl., ¶¶ 4-6.

cated to sexually-oriented programming," an MSO "shall fully scramble or otherwise fully block the video and audio portion of such channel so that one not a subscriber to such channel or programming does not receive it." Until the MSO complies with those requirements, it "shall limit the access of children" to such programming "by not providing such programming during the hours of the day (as determined by the [Federal Communications] Commission) when a significant number of children are likely to view it." 110 Stat. 136.

On March 5, 1996, the Federal Communications Commission issued an interim rule for implementation of Section 505. Order and Notice of Proposed Rulemaking, *In re Implementation of Section 505 of the Telecommunications Act of 1996*, 11 F.C.C. Rcd. 5386 (1996) (*Implementation of Section 505*). First, the Commission interpreted the term "sexually explicit adult programming," as used in Section 505, to be a category of "programming that is indecent," a phrase also used in the statute. *Implementation of Section 505*, ¶¶ 6, 9. The Commission also construed Section 505 to require scrambling or time-channeling only of that programming on a network primarily dedicated to sexually-oriented programming which is itself indecent. See *Implementation of Section 505*, ¶ 6.

The Commission defined "'indecent' programming" on an interim basis to mean "any programming that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable or [other multichannel video programming distribution] medium," and proposed to adopt that definition on a permanent basis. *Implementation of Section 505*, ¶¶ 9, 16. As the Commission explained, that is essentially the same definition adopted by the Commission, and repeatedly sustained by

the courts, for purposes of regulating indecent broadcast programs and telephone messages.

The Commission finally proposed, and provisionally adopted, a safe harbor for purposes of Section 505's time-channeling requirement of 10:00 p.m. to 6:00 a.m., the same safe harbor hours previously established for airing indecent broadcast television or radio programs. *Implmentation of Section 505*, ¶¶ 5, 8; see also 47 C.F.R. 73.3999.

4. Appellants provide "virtually 100% sexually explicit adult programming" (J.S. App. 8a) for transmission by cable operators to premium subscribers. Appellant Playboy provides such programming via its Playboy Television and AdulTVision networks, while appellant Spice Entertainment[5] provides the programming on its Adam & Eve and Spice networks.

On February 26, 1996, Playboy filed suit in district court seeking declaratory and injunctive relief against the operation of Section 505. The complaint alleged that Section 505 violated appellant's rights under the First Amendment and the equal protection component of the Due Process Clause of the Fifth Amendment. The district court consolidated the action with a similar action brought by Spice Entertainment, and on March 7 granted a temporary restraining order preventing Section 505 from going into effect on March 9. J.S. App. 4a-5a & n.7; see *Playboy Entertainment Group, Inc.* v. *United States*, 918 F. Supp. 813 (D. Del. 1996). A three-judge district court was then appointed under Section 561(a) of the Act. J.S. App. 3a-4a & n.6. Following discovery and briefing, the three-judge district court held a hearing on appellants' motion for a preliminary injunc-

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[5] The district court refers to appellant Spice Entertainment Companies by its former name, Graff Pay-Per-View, Inc.

tion. The court permitted supplemental briefing after this Court's decision in *Denver Area Educational Telecommunications Consortium* v. *FCC*, 116 S. Ct. 2374 (1996). J.S. App. 5a.

5. On November 8, 1996, the court issued a decision denying appellants' motion for a preliminary injunction against implementation and enforcement of Section 505. The court recognized that issuing a preliminary injunction against "a law drafted and adopted by a co-equal branch of government" invokes "one of the judiciary's most 'awesome responsibilit[ies] calling for the utmost circumspection in its exercise.'" J.S. App. 20a (quoting *Heart of Atlanta Motel, Inc.* v. *United States*, 85 S. Ct. 1, 2 (1964) (Black, J., in chambers)). The court concluded that "at this preliminary injunction stage, * * * [appellants] ha[d] not met the requirements for the issuing of a preliminary injunction." J.S. App. 20a. In particular, the court noted that appellants had failed to show "that they are likely to prevail on the merits if [their] claims are ultimately litigated" and failed to "demonstrate that the public interest is served by permitting signal bleed to invade nonsubscribers' homes, particularly in view of our interest in protecting children from a pervasive medium which transmits sexually explicit sounds and images." *Id.* at 22a.

a. The court held, under *Denver Area*, that appellants' First Amendment claim had to be reviewed under "strict scrutiny or something very close to strict scrutiny" as a content-based restriction on speech. J.S. App. 25a. Even though Section 505 is "aimed at the content-neutral objective of preventing signal bleed," the court analyzed it as a content-based restriction because it applies "only when signal bleed occurs during the transmission of 'sexually explicit adult programming or other programming that is indecent.'" J.S. App. 27a.

The court found that Section 505 addresses a compelling interest in "protect[ing] children from sexually explicit material, particularly in the context of a pervasive medium" such as cable television. J.S. App. 27a. The court noted that in *Denver Area*, a plurality of this Court had found that cable television, like the radio broadcast system in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), is "uniquely pervasive" and that it is "as 'accessible to children' as over-the-air broadcasting if not more so." J.S. App. 30a (quoting *Denver Area*, 116 S. Ct. at 2386). Because of imperfect signal scrambling, millions of children "have potential access not only to indecent sounds, * * * but also to sexually explicit visual images," even in those households that "do not subscribe to sex-dedicated networks." J.S. App. 31a.

The court also held that Section 505 is carefully tailored to further the compelling interest in protecting children. The court explained that Section 505 "does not seek to ban sexually explicit programming, nor does it prohibit consenting adults from viewing erotic material on premium cable networks if they so desire." J.S. App. 34a. Instead, Section 505 gives cable operators two alternative means of compliance—complete scrambling of audio and video or time-channeling. Although the court recognized that there would be a "substantial expense" involved in completely scrambling the audio and video, it noted that "§ 505 does *not* require that [cable operators] shoulder potentially fatal economic burdens." *Id.* at 32a-33a. Moreover, the court held that the economic burden imposed by the complete scrambling requirement is mitigated "in light of the substantially less expensive option provided by time-channeling," *id.* at 33a, which the Supreme Court in *Pacifica* had held to be constitutional in analogous circumstances. *Ibid.*

The court also rejected the claim that Section 504 is a less restrictive alternative that would accomplish the same end. Section 504 requires cable operators, on subscriber request, to scramble fully or otherwise fully block audio and video transmission of *any* channel, without charge. But under Section 504, the subscriber must learn of the problems caused by signal bleed and of the availability of complete scrambling on request, and the subscriber must then take the initiative in making the request of the cable operator. J.S. App. 35a. The court found that the evidence, at this stage of the case, did not show that Section 504 was "a viable alternative." *Ibid.* The court noted that "many parents are unaware of the problem of sexually explicit signal bleed and its accessibility to children." *Id.* at 35a n.28. The court also explained that, even insofar as parents are aware of the problem, "there is no evidence that parents are * * * aware of the § 504 means of achieving complete blocking of undesired channels." *Id.* at 35a. The court added that "children watch television in the homes of their friends as well as in their own homes," and that Congress reasonably wished "to extend protection from signal bleed beyond a child's own home." *Ibid.*

b. The court also held that plaintiffs are unlikely to succeed on the merits with respect to their equal protection claim. The court noted that Section 505 treats sex-dedicated networks differently from other premium networks, which occasionally showed sexually explicit scenes in their programming. The court noted, however, that sex-dedicated networks such as those operated by appellants transmit sexually explicit adult programming 24 hours a day. By contrast, the court referred to evidence that sexually explicit programming constitutes "only a fraction of the programming"—in one cited instance, substantially less than one-sixteenth—on ordinary

premium channels. J.S. App. 37a. The court explained that Congress's distinction is justified because "signal bleed from that one-sixteenth * * * would not continuously present sexually explicit scenes to the channel surfer." *Ibid.*

c. Finally, the court held that Section 505 is not unconstitutionally vague. The use of accepted terms such as "indecent" give the statute sufficiently clear meaning. J.S. App. 39a-40a.

6. Appellants filed notices of appeal (96-1034 J.S. App. 42a; 96-1108 J.S. App. 1a), and moved for an injunction pending appeal. On November 15, 1996, the district court stayed enforcement of Section 505 pending disposition of appellants' motions. On December 5, 1996, the district court granted a stay of enforcement pending appeal. Section 505 of the Act has thus not yet been permitted to go into effect.

ARGUMENT

The district court refused to preliminarily enjoin the implementation and enforcement of an Act of Congress, holding that appellants had failed to satisfy the prerequisites for such relief at this stage of the litigation. That decision, which is subject only to narrow appellate review for abuse of discretion, should be summarily affirmed. In light of the weighty presumption of constitutionality that accompanies an Act of Congress, a district court's refusal to enjoin a statute's implementation at an early stage of litigation and before the parties have had opportunity for a full factual and legal presentation could constitute error only in the most exceptional circumstances. Indeed, the district court's opinion in this case specifically refers to issues that remain to be resolved in further proceedings, thus rendering the case particularly unsuitable for plenary review at this time. Moreover, the district

court's determination that appellants are unlikely to succeed on the merits follows settled First Amendment doctrine, set forth in decisions of this Court up to and including this Court's recent decision in *Denver Area*. Accordingly, this is plainly not the rare case in which an Act of Congress is so patently unconstitutional that a district court could be viewed as having abused its discretion by refusing to enjoin its implementation during the pendency of litigation.

1. This Court has frequently reaffirmed the "well-established doctrine that an application for an interlocutory injunction is addressed to the sound discretion of the trial court; and that an order either granting or denying such an injunction will not be disturbed by an appellate court unless the discretion was improvidently exercised." *Alabama* v. *United States*, 279 U.S. 229, 230-231 (1929). Accord *Brotherhood of Locomotive Engineers* v. *Missouri-Kansas-Texas R.R.*, 363 U.S. 528, 535 (1960) ("The balancing of * * * competing claims of irreparable hardship is, however, the traditional function of the equity court, the exercise of which is reviewable only for abuse of discretion."); *Yakus* v. *United States*, 321 U.S. 414, 440-441 (1944) ("award of an interlocutory injunction * * * has never been regarded as strictly a matter of right"); *Hecht Co.* v. *Bowles*, 321 U.S. 321, 331 (1944); *Deckert* v. *Independence Shares Corp.*, 311 U.S. 282, 290 (1940); *Prendergast* v. *New York Tel. Co.*, 262 U.S. 43, 50-51 (1923); *Synanon Found., Inc.* v. *California*, 444 U.S. 1307 (1979) (Rehnquist, J., in chambers).

In this case, the district court exercised its discretion to refuse to grant a preliminary injunction against implementation and enforcement of an Act of Congress. Such a decision would constitute an abuse of discretion only in the most exceptional circumstances. "[J]udicial power to stay an act of Congress, like judicial power to

hold that act unconstitutional, is an awesome responsibility calling for the utmost circumspection in its exercise." *Heart of Atlanta Motel, Inc.* v. *United States*, 85 S. Ct. 1, 2 (1964) (Black, J., in chambers). Acts of Congress are presumptively constitutional, *United States* v. *National Dairy Prods. Corp.*, 372 U.S. 29, 32 (1963); *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985), and should not be invalidated except "for the most compelling constitutional reasons." *Mistretta* v. *United States*, 488 U.S. 361, 384 (1989) (internal quotations omitted). Absent such a showing, the challenged statute "should remain in effect pending a final decision on the merits by [the courts]." *Turner Broadcasting Sys., Inc.* v. *FCC*, 507 U.S. 1301, 1302 (1993) (Rehnquist, C.J., in chambers). Accord *Bowen* v. *Kendrick*, 483 U.S. 1304 (1987) (Rehnquist, C.J., in chambers).

Those principles apply no less in First Amendment cases than in others. Where the constitutionality of an Act of Congress is not at issue, the possibility of an injury to a party's First Amendment rights may justify issuance of a preliminary injunction under some circumstances. But when a party seeks to enjoin implementation and enforcement of an Act of Congress, the balance of equities shifts significantly against invalidating the Act on a preliminary basis—and based on an incomplete record—during the pendency of litigation.

For example, *Turner Broadcasting* involved a First Amendment challenge to provisions of the 1992 Cable Act, which require cable operators to set aside a portion of their channel capacity for carriage of local broadcast stations. Plaintiffs sought, and were denied, an injunction against enforcement of these "must carry" provisions pending this Court's review. 507 U.S. at 1302. Indeed, the must-carry requirements remain in effect even though this Court vacated the lower court's judgment

upholding their constitutionality, remanded the case for further proceedings, see *Turner Broadcasting Sys., Inc.* v. *FCC*, 512 U.S. 622 (1994), and has accepted the case again for additional review. *Turner Broadcasting Sys., Inc.* v. *FCC*, No. 95-992 (argued Oct. 7, 1996).[6]

The district court's determination not to invalidate Section 505 during the pendency of litigation was particularly appropriate in light of the state of the record in this case. For example, one of appellants' key arguments is that the availability of consumer-initiated channel-by-channel blocking under Section 504 is sufficient to render Section 505 a more restrictive—and hence, in their view, unconstitutional—alternative. See 96-1034 J.S. 19-20, 20-21; 96-1108 J.S. 20-22. Substantial evidence was introduced, however, that Section 504 is not a viable alternative to Section 505.[7] The district court noted that appellants failed to produce contrary evidence that "MSOs are

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[6] See also *Daniels Cablevision, Inc.* v. *FCC*, 835 F. Supp. 1, 10-12 (D.D.C. 1993), aff'd in part *sub nom.*, *Time Warner Entertainment Co.* v. *FCC*, 93 F.3d 957 (D.C. Cir. 1996) (holding three provisions of the 1992 Cable Act unconstitutional, but nevertheless declining to enjoin their enforcement pending appeal).

[7] For example, complete blocking on request through the use of "lockboxes" has been available by law since at least 1984, when Congress enacted 47 U.S.C. 544(d)(2). The primary relevant difference between that provision and Section 504 is that under prior law the cable operator could charge customers for the lockbox. Yet the record in this case demonstrates that, notwithstanding the availability of lockboxes and the fact that there is no evidence that anyone affirmatively desires signal bleed, see J.S. App. 13a, appellants' networks are "bleeding" into millions of cable households that do not subscribe to their programming. That constitutes significant evidence that complete blocking on request is ineffective to protect children from signal bleed. Cf. *Denver Area*, 116 S. Ct. at 2393. In addition, signal bleed poses further problems because children view television not only in their own homes, but also in the homes of their friends. J.S. App. 11a-12a.

advising cable customers of the availability" of the Section 504 process or that "customers are responding to such notices, if given." J.S. App. 17a.[8] But the court also noted that "[a]t the time of the permanent injunction hearing, further evidence of the actual and predicted impact and efficacy of § 504 would be helpful to us." *Ibid.* See also *id.* at 13a n.13 (noting need for "more specific evidence of the number of households with the potential for signal bleed" before decision on permanent injunction); *id.* at 19a n.19 (expressing "skepti[cism]" regarding appellants' "estimate of revenue loss"); *id.* at 29a n.25 (noting need for "additional evidence demonstrating the effects of sexually explicit materials on children" before decision on permanent injunction). With potential factual uncertainties of that sort still remaining, the district court properly declined to enjoin Section 505.

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[8] Appellants err in arguing (96-1034 J.S. 20-21; 96-1108 J.S. 21-22) that the district court incorrectly shifted the burden of proof on whether Section 504 would be a less restrictive alternative. Initially, appellants' argument appears to rest on the incorrect premise that in a preliminary injunction proceeding where parties seek to enjoin an Act of Congress, the government must conclusively prove its case in favor of constitutionality in full before the court may reject the request for an injunction. See, *e.g.*, 96-1108 J.S. 22 n 19. In any event, the government in this case introduced substantial evidence, accepted by the district court, that the "lockbox" alternative provided by the 1992 Cable Act and its close cousin, the Section 504 complete-blocking-on-request option, had not been effective to resolve the problem and are therefore unlikely to be effective in the future. See note 7, *supra*. When the district court stated that there was not enough evidence to let the court "effectively assess plaintiffs' claim that § 504 is likely to become a viable remedy for eliminating signal bleed," J.S. 20 (quoting J.S. App. 17a), it was simply pointing out that appellants had failed to rebut the government's case and were, on the present record, therefore not likely to succeed on the merits.

2. The district court's determination that appellants are unlikely to succeed on the merits represents a straightforward application of settled precedent from this Court, recently reaffirmed in *Denver Area*.

a. Section 505 is constitutional for the same reasons that this Court found Section 10(a) of the statute before the Court in *Denver Area* constitutional. Section 10(a) authorizes cable operators to ban indecent programming that would otherwise be broadcast on leased access channels. The justification for Section 505 is the same interest that the plurality in *Denver Area* found justifies Section 10(a): "[t]he need to protect children from exposure to patently offensive sex-related material," which "this Court has often found compelling." 116 S. Ct. at 2386.

Moreover, as in *Denver Area*, the problem addressed by Section 10(a)—the need to protect children from indecent material on television—is "remarkably similar" to the problem that this Court had previously addressed in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), and Congress's solution is also "commensurate with the balance [the Court] approved [in *Pacifica*]." 116 S. Ct. at 2386. In *Pacifica*, the Court upheld a requirement that radio broadcasters limit indecent language to times of the day when children are unlikely to be in the audience. A broadcaster may comply with Section 505 by similarly limiting indecent visual or audio material on appellants' networks to the same times of day. See also *Denver Area*, 116 S. Ct. at 2387 (noting that the fact that Section 10(a) grants operators "flexibility" to "rearrange broadcast time" to "lessen[] the risks of harm to children" supports its constitutionality). Indeed, Section 505 is substantially less restrictive than the requirement at issue in *Pacifica*. While the broadcaster in *Pacifica* was offered *only* the option of time channeling the indecent programming,

Section 505 also offers the option of complete blocking to eliminate signal bleed.

The plurality in *Denver Area* also referred to "the permissive nature of § 10(a)" as supporting its constitutionality. 116 S. Ct. at 2387. The plurality explained that "although the provision does create a risk that a program will not appear, that risk is not the same as the certainty that accompanies a governmental ban." *Ibid.* The plurality recognized that under Section 10(a) the cable operator could choose to "ban" the indecent programming altogether, "in light of comparative audience demand and a host of other practical factors." *Ibid.* Yet despite that "uncertainty as to practical consequences," *ibid.*, the Court held Section 10(a) to be constitutional.

In this case, the requirements imposed by Section 505 also do not amount to an outright "governmental ban." As noted above, cable operators may comply with Section 505 by time channeling appellants' programming to the FCC's "safe harbor"—the same safe harbor found constitutionally acceptable in *Pacifica*. As the district court held (J.S. App. 33a-34a), the availability of that option is sufficient to justify Section 505.

In addition, the district court's findings reflect that completely blocking the audio and video signal to preclude signal bleed is also a viable option. The district court relied on the evidence of an officer of appellant Spice, who "testified that roughly half of the systems carrying [Spice] programming are in compliance with § 505." J.S. App. 15a. Those systems either use modern baseband technology that fully scrambles both video and audio signals, see *id.* at 9a n.12, or they "have already adopted 'double scrambling'" to eliminate "audio and/or video bleeding," *id.* at 19a. Moreover, many households have "convertor boxes [that] will map out [appellants'] channels and as a consequence these households will not

receive 'signal bleed.'" *id.* at 12a. Finally, digital cable television, a technology now being adopted by cable systems, "will prevent all audio and video bleeding." *Id.* at 15a.

Thus, some cable systems already have eliminated the problem of signal bleed without time channeling. In light of the large number of households that are already effectively in compliance and the trend toward digital television, other cable operators are likely to be able to do so as well. Accordingly, by offering the option of eliminating signal bleed while continuing 24-hour-a-day programming, Section 505 protects children from indecent materials in a way that is less restrictive than that which this Court found constitutional in *Denver Area* and *Pacifica*.

b. Section 505 does not suffer from the defects that led this Court in *Denver Area* to find two other statutory provisions unconstitutional. The Court in *Denver Area* held that Section 10(b)—the provision requiring cable operators to segregate indecent leased access programming on separate channels available to subscribers only on request—had a number of features that, cumulatively, rendered the statute unconstitutional. None of them are applicable to Section 505.

Section 10(b) permitted a delay of up to 30 days before a cable operator had to respond to a subscriber's request for access to (or reblocking of) an "indecent" channel. It also required viewers to request access to the segregated, "indecent" channel in writing, thus deterring viewers concerned about maintaining their privacy. By contrast, the Court specifically cited Section 505, among other provisions, as "significantly less restrictive than [Section 10(b)]." 116 S. Ct. at 2392.[9] It does not "force the viewer

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[9] A majority of the Court joined in the portion of the opinion addressing Section 10(b).

to receive (for days or weeks at a time) all 'patently offensive' programming or none." *Ibid.* Nor does it "automatically place the occasional viewer's name on a special list," *ibid.*; as the district court noted, "with sexually explicit premium and pay-per-view programming, the subscriber will * * * be identifiable through billing for the programming," regardless of whether Section 505 is implemented. J.S. App. 19a. In short, although Section 10(b) in *Denver Area* was not "a narrowly, or reasonably, tailored effort to protect children," 116 S. Ct. at 2394, Section 505 "strikes a permissible balance of constitutional interests." J.S. App. 34a.[10]

The Court in *Denver Area* also held Section 10(c) of the 1992 Act unconstitutional. That provision applied to public, educational, and governmental (PEG) access channels, as opposed to the commercial leased access channels to which Sections 10(a) and 10(b) applied. Section 10(c) provided that cable operators could refuse to

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[10] Appellant Spice Entertainment's claim (96-1108 J.S. 2) that Section 505 "interferes even more substantially" with speech than Section 10(b) is wrong. Aside from the distinctions cited in text, Section 10(b) attempted to regulate quite directly the communications between the programmer and its intended audience; the statute provided that such communications could take place only on segregated channels to which indecent programming would be confined and that had been specifically requested, in writing, by each viewer. Although a casual viewer may desire the programming and the programmer may want to reach that viewer, Section 10(b) would have precluded the communication from occurring absent the segregation on a separate channel and the viewer's written request. Section 505, by contrast, is not aimed at the communication between the programmer and the intended viewer, and it imposes no mandatory requirements on such communication. Instead, it provides that steps must be taken to avoid communication between the programmer and individuals whom the programmer is trying *not* to reach and who have no interest in receiving the programming (because they have not subscribed to it).

show indecent material on PEG channels. As the plurality explained, Section 10(c) was unconstitutional primarily because there was no showing that there was a legitimate need for giving cable operators that kind of veto power over PEG programming. The plurality noted that, under the pre-1992 Act regime, each community already had "a locally accountable body capable of addressing the problem, should it arise, of patently offensive programming broadcast to children, making it unlikely that many children will in fact be exposed to programming considered patently offensive in that community." 116 S. Ct. at 2395.[11] By contrast, the district court in this case found that "[t]here is no question that * * * millions of children * * * have potential access not only to indecent sounds, * * * but also to sexually explicit visual images." J.S. App. 31a. And, as the district court stated, "[u]pon this record, the government has demonstrated that § 504 will not be a viable alternative" to address that problem. *Id.* at 35a. See also *id.* at 17a (granting appellants the opportunity, "[a]t the time of the permanent injunction hearing," to present "further evidence of the actual and predicted impact and efficacy of § 504"). Accordingly, Section 505 does not suffer from the defect that rendered Section 10(c) unconstitutional in *Denver Area*.

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[11] See also 116 S. Ct. at 2395-2396 ("the public/nonprofit programming control systems now in place would normally avoid, minimize, or eliminate any child-related problems concerning 'patently offensive' programming"); *id.* at 2396 (finding no "significant nationwide pattern" of indecent programming accessible to children on PEG channels); *id.* at 2397 ("In the absence of a factual basis substantiating the harm and the efficacy of [Section 10(c)], we cannot assume that the harm exists or that the regulation redresses it."); *ibid.* ("given present supervisory mechanisms, the need for [Section 10(c)], aimed directly at public access channels, is not obvious").

3. Appellants argue (96-1034 J.S. 13; 96-1108 J.S. 14-15) that eliminating signal bleed from appellants' programming under Section 505 would require cable operators to incur significant additional costs; that the operators will choose to avoid those costs by adopting the time channeling alternative instead; and that that is sufficient to demonstrate that Section 505 is unconstitutional.

The district court did find that there is "a substantial expense involved in complying with [Section 505]." J.S. App. 32a. As the court recognized, however, "economics alone cannot dictate the result where constitutional rights are at issue." *Ibid.* The extra costs involved are the result of the "indirect effects" of signal bleed on individuals who are not part of their audience, who do not want their programming, and with whom they have no interest in communicating. See *id.* at 2a-3a ("[appellants] do not contend that signal bleed itself is protected speech"); *id.* at 13a ("No evidence was presented of any consumer desire to receive 'signal bleed.'"). This Court has consistently held that a speaker may be forced to bear such indirect costs of its programming. See, *e.g.*, *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 53-54 (1986); *Young* v. *American Mini Theaters, Inc.*, 427 U.S. 50, 78 (1976) (Powell, J., concurring). And in *Denver Area*, the Court pointedly noted that an acceptable mode of dealing with the problem of children's access to patently offensive sexually explicit programming is to "impos[e] cost burdens upon system operators (who may spread them through subscription fees)." 116 S. Ct. at 2393. In Section 505, that is exactly what Congress did (although it mitigated the burden of those costs by adding the additional option of time channeling).

Even if the precise costs of compliance with Section 505 were of significance, that amount is open to substan-

tial doubt on this record. The district court found reasons to be "skeptical of [appellants'] estimate of revenue loss," J.S. App. 19a n.19, indicating that it would be inappropriate to base a preliminary injunction on inflated and unproven claims of dire economic consequences.[12] Moreover, for the reasons given above, see pp. 18-19, compliance with Section 505's complete blocking requirement is a viable option. And Section 505 also contains the time-channeling safe harbor, a restriction upheld in *Pacifica* in a context in which it was the *only* option available. In permitting an additional option which is technology feasible here, the government is not required to subsidize that option. Here, the district court correctly concluded that "§ 505 does *not* require that MSOs shoulder potentially fatal economic burdens." J.S. App. 32a-33a.[13]

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[12] Appellant Playboy asserts that the district court "found as a factual matter that Section 505(a) would 'undoubtedly' impose 'substantial expense' upon cable operators and 'potentially fatal economic burdens,' including the 'possibility of bankruptcy' of the targeted networks." 96-1034 J.S. 13. That assertion is inaccurate. The district court did state that there is "undoubtedly a substantial expense involved in complying with subsection (a) [full scrambling]," J.S. App. 32a, but the other two quoted phrases are the court's statement of *appellants'* position. Thus, the court stated: "Not only do [appellants] foresee lost profits, they present the possibility of bankruptcy caused by implementation of § 505." *Ibid.* (emphasis added). The court itself, by contrast, expressed skepticism about appellants' estimates of economic injury, *id.* at 19a, and found that such injury would *not* be "potentially fatal." *Id.* at 33a.

[13] Even if the time channeling safe harbor is used, Section 505 leaves open ample means for adults to view indecent programming when it is broadcast or they "may * * * use a VCR to tape adult programming during the safe harbor hours." J.S. App. 20a n.6. Although appellant Spice argues that time-shifting through use of a VCR is not an adequate alternative, 97-1108 J.S. 8-9, the district court noted that Spice's Vice President testified "that a 10:00 p.m. starting

4. Appellants argue (96-1034 J.S. 22-25; 96-1108 J.S. 24-29) that Section 505 violates their right to equal protection of the laws. Appellants assert that Congress could not legitimately distinguish between continuous indecent programming, such as that on appellants' networks, and the occasional sexually explicit programming on other premium cable networks. That argument is mistaken.

In *Denver Area*, the Court "recognize[d] * * * that Congress need not deal with every problem at once." 116 S. Ct. at 2393. See also *United States* v. *Edge Broadcasting Co.*, 509 U.S. 418, 434 (1993) (Court does "not require that the Government make progress on every front before it can make progress on any front"). The district court in this case determined that sex-dedicated networks such as those run by appellants pose a unique threat that justifies distinct legal treatment. For example, the court referred to evidence showing that "the number of sexually explicit programs available on non-adult channels * * * was one sixteenth that shown on the [appellants'] adult channels." J.S. App. 8a. Further, the court noted, even that figure substantially overstates the indecent programming on the non-adult channels. The non-adult channels show "mainly 'R' rated movies which contained some sexually explicit scenes but were not continuously sexually explicit." *Ibid.* By contrast, appellants' programming is "continuously sexually explicit," *ibid.*; they provide "nothing but

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time would cause no loss of revenue" because "people may rearrange their viewing schedule or use a VCR to tape adult programming during the safe harbor hours." J.S. App. 20a n.19. Section 505 also leaves adults entirely free to obtain indecent programming by "purchas[ing] tapes and records or go[ing] to theaters and nightclubs" where indecent programming is available. *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 750 & n.28 (1978).

sexually explicit programming intended for adult audiences," *id.* at 37a-38a.

In light of those findings, Congress's determination to address the problems caused by appellants' networks is unassailable. A child innocently flipping the channels of a cable television would be very *un*likely to view or hear sexually explicit signal bleed from ordinary, non-adult premium channels. The same child, however, could not help but view or hear sexually explicit materials—such as "scrambled images of * * * two nude women in the water and in a boat, caressing each other" or "the sounds of what appear to be repeated sexual encounters accompanied by assorted orgiastic moans and groans," J.S. App. 12a—if the child advertently or inadvertently turned to signal bleed from appellants' networks. As the district court explained, "[t]he cause of the problem was primarily traced to sex-dedicated networks and, understandably, Congress began its efforts to address the problem by focusing on those networks." *Id.* at 38a.

5. Appellant Playboy claims (96-1034 J.S. 25-29) that Section 505 is unconstitutionally vague. See also 96-1108 J.S. 29 n.30. Section 505 applies to "sexually explicit adult programming or other programming that is indecent on any channel * * * primarily dedicated to sexually-oriented programming." This Court has repeatedly upheld similar definitions against vagueness challenges.[14] The district court's determination, at this stage of the litigation, that appellant Playboy is unlikely to succeed on its vagueness challenge was accordingly correct.

The FCC has interpreted the key terms in Section 505. It interpreted the term "sexually explicit adult programming" to be a category of "programming that is

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[14] Lower federal courts have also rejected vagueness challenges in similar circumstances. See 96-1034 J.S. 26 n.30 (citing cases).

indecent," a term that follows it in the statute. *Implementation of Section 505*, ¶¶ 6, 9. The Commission also construed Section 505 to require scrambling or time-channeling only of programming that is itself indecent and that is broadcast on a network primarily dedicated to sexually-oriented programming. See *Implementation of Section 505*, ¶ 6. The Commission defined "'indecent' programming" on an interim basis to mean "any programming that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable * * * medium," and it proposed to adopt that definition on a permanent basis. *Implementation of Section 505*, ¶¶ 6, 9.

The FCC has thus defined the key statutory terms in terms of "indecent programming," and it has defined "indecent programming" in terms of "patently offensive" depictions of "sexual or excretory activities or organs." That definition is similar to the second element in the definition of obscenity in *Miller* v. *California*, 413 U.S. 15, 24 (1973) ("depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law"). The Court in *Miller* upheld that formulation against a vagueness challenge. *Id.* at 27 & n.10. See also *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46, 57-58 & n.6 (1989) (rejecting vagueness challenge to statute that defined obscene conduct as conduct that, *inter alia*, "depicts or describes, in a patently offensive way, sexual conduct"). The definition is also similar to the statute at issue in *Ginsberg* v. *New York*, 390 U.S. 629 (1968), which criminalized sale to minors of obscene pictures that were, *inter alia*, "patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors." *Id.* at 633.

The Court in *Ginsberg* rejected a vagueness challenge to that statute. *Id.* at 643-645.

In *Denver Area*, a four-Justice plurality of the Court expressly rejected a vagueness challenge to a provision giving cable operators a right to prohibit programming on leased channels "that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." 116 S. Ct. at 2381, 2389-2390. Three additional Justices voted to uphold the constitutionality of that provision, thereby implicitly rejecting the vagueness challenge. *Id.* at 2419 (opinion of Thomas, J., concurring in part and dissenting in part).

Appellant Playboy concedes that its network is covered by Section 505, but it argues that the statute is vague because "it is unknown what *other* networks might be affected." 96-1034 J.S. 27 (emphasis added).[15] That argument fails, however, because a party to whom an allegedly vague statute applies has no standing to complain of its vagueness with regard to others. *Parker* v. *Levy*, 417 U.S. 733, 756 (1974) ("One to whose conduct a statute

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[15] Appellant Playboy (96-1034 J.S. 28) refers to Section 506 of the 1996 Act, which appellant states "added 'nudity' to the list of proscribable 'indecent' programming on public and leased access channels." Section 506, however, amends the statute upheld in *Denver Area* and applies *only* to public and leased access channels. It does *not* apply to channels covered by Section 505, *i.e.*, "any channel * * * primarily dedicated to sexually-oriented programming." Accordingly, the term "nudity" in Section 506 has no application to appellants' programming and it has no bearing on the constitutionality of Section 505. See also Order and Notice of Proposed Rulemaking, *In re Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, FCC 96-154, CS Docket No. 96-85, ¶ 111 (1996) ("tentatively conclud[ing] that the term 'nudity' as used in Section 506(a) and (b) of the 1996 Act should be interpreted to mean nudity that is obscene or indecent").

clearly applies may not successfully challenge it for vagueness."); see *American Mini Theatres*, 427 U.S. at 58-59.

The Constitution requires the government to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972). Perfect clarity, however, is neither possible nor constitutionally required, *id.* at 110, particularly in a statute like Section 505 that imposes a civil regulatory requirement on commercial entities, rather than a criminal prohibition. See, *e.g.*, *Kolender* v. *Lawson*, 461 U.S. 352, 359 n.8, 361 (1983); *Winters* v. *New York*, 333 U.S. 507, 515 (1948) ("The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement.").[16] In light of their history and authoritative interpretation by the FCC, the terms "patently offensive" and "sexual or excretory activities or organs" give fair warning concerning what types of depictions and communications are and are not prohibited by Section 505. If the legislature is to be permitted to protect children by regulating the broadcast of patently offensive communications, no greater precision can be expected or required.

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[16] Under 47 U.S.C. 501, anyone "who willfully and knowingly does * * * any act" that is "prohibited or declared to be unlawful" by the Communications Act of 1934, which includes Section 505, is subject to criminal prosecution. The various provisions of the Communications Act relating to indecency, however, have always been enforced through use of the FCC's civil remedial authority, not through the criminal law. Section 505 is therefore appropriately treated as a civil statute in analyzing the vagueness issue, particularly in the context of this pre-enforcement facial challenge to its validity.

CONCLUSION

The order of the district court denying a preliminary injunction should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

SPICE ENTERTAINMENT COMPANIES, INC.
Appellant,

—v.—

JANET RENO, ATTORNEY GENERAL; THE UNITED STATES OF AMERICA; THE UNITED STATES DEPARTMENT OF JUSTICE; AND THE FEDERAL COMMUNICATIONS COMMISSION,
Appellees.

ON APPEAL FROM A THREE-JUSTICE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

BRIEF IN OPPOSITION TO THE MOTION TO AFFIRM

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PRELIMINARY STATEMENT

Like the internet case about to be argued, *Reno v. ACLU*, last term's leased- and public-access cable case, *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC* 116 S. Ct. 2374 (1996) ("*DAETC*"), and the earlier "dial-a-porn" cases, *e.g. Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989), this case involves a content-based law designed to make specified speech unavailable unless willing speakers or willing listeners surmount various Congressionally-erected hurdles to access to such speech. Strict scrutiny is therefore required to ensure that such restrictions do not become effective unless they are *necessary* to "promote a compelling interest," "the least restrictive means to further the articulated interest," and "carefully tailored to achieve those ends." *Sable*, 492 U.S. at 126. *See also Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Board*, 502 U.S. 105 (1991). Otherwise, an overzealous new prohibitionism and perceived new legal standards contrary to our tradition of free expression will suppress the possibilities created by the telecommunications revolution.

Given the core First Amendment interests at stake, this case cannot be properly resolved by simplistic analogy to the inapposite technological circumstances that were presented in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); by ignoring that portion of *DAETC* striking down Section 10(b) of the 1992 Cable Act, which is legally indistinguishable from § 505; or by dismissing less-restrictive alternatives, enacted at the same time as the provision at issue here, because they have necessarily not yet been able to demonstrate their efficacy.

Summary affirmance would place this Court's imprimatur on a government-compelled time-channeling scheme that will diminish appellants' viewership by thirty percent in affected cable systems — even though every prior court has deemed time-channeling impermissible for cable television in view of available less restrictive alternatives to advance the identified interest. *See* Spice (formerly Graff) Jurisdictional Statement ("Spice JS") at 5 n.2. Such a result would deviate radically from this Court's precedents, particularly one as recent as *DAETC*, and would confuse the courts, Congress, the industry, and the public about the meaning of this Court's decision in *DAETC*

and the permissible bounds of governmental content-regulation of speech.

ARGUMENT

1. The government bases its argument for summary affirmance on a general rule that absent "exceptional circumstances," "the challenged statute *'should remain in effect* pending a final decision on the merits by [the courts].'" Motion to Affirm ("Motion") at 14 (*quoting Turner Broadcasting Sys., Inc. v. FCC*, 507 U.S. 1301, 1302 (1993) (emphasis added)). There is no such rule in First Amendment cases, particularly where the law sought to be enjoined would alter the status quo. This case differs from all those cited by the government (except *Turner*) because it is a free speech case; and it differs from *Turner* (and from *Bowen v. Kendrick*, 483 U.S. 1304 (1987) (Rehnquist, C.J. in chambers), which the government also cites) because here, maintaining the status quo required granting the preliminary injunction, not denying it. Indeed, the district court recognized as much when, after denying the preliminary injunction, it nonetheless granted (after full briefing) plaintiffs' motion to stay enforcement § 505 pending this Court's review.

Summary affirmance would alter the status quo by removing from cable systems (for two-thirds of each day) constitutionally-protected programming. By contrast, in prior cases, comparable statutes were not permitted to go into effect – and thereby interfere by governmental fiat with available programming – pending this Court's resolution of the First Amendment questions posed. The stays entered enjoining enforcement pending review (without adverse comment from this Court) in *Sable, DAETC*, and *Reno v. ACLU* all contradict the government's unsupported contention that the balance of equities always tips against "enjoin[ing] implementation and enforcement of an Act of Congress . . . during the pendency of litigation." Motion at 14. Nor is there anything in this case that renders the record below any more incomplete or the risk of harm of exposure from the regulated communication any greater than was the case in *Sable, DAETC* and *Reno v. ACLU*,

where federal statutes remained enjoined throughout the pendency of litigation.

Reversing the decision below would simply restore this case to the posture in which First Amendment challenges to telecommunications statutes are usually litigated, and protect the interests of cable systems operators, programmers and willing adult viewers pending this Court's resolution of the issues raised. As Playboy has shown in its Brief Opposing the Motion to Affirm in No. 96-1034 (at 12), this case is appropriate for resolution now, as there are no "issues that remain to be resolved in further proceedings" that are of constitutional significance or that preclude plenary review now. In the meantime, parents who wish to avoid a child's inadvertent exposure to appellants' programming can avail themselves of the parental control devices also mandated by the CDA, and the government is free to publicize their availability.

2. The government's use of *DAETC* to defend the district court's decision is utterly unpersuasive. It not only entirely ignores that portion of *DAETC* striking down § 10(b) of the 1992 Cable Act – the provision most analogous to the restriction under review here – but it analogizes § 505 to § 10(a) of the 1992 Cable Act claiming that both are "permissive." Doing so ignores the evidence and the finding that non-compliant MSOs will comply with § 505 by confining appellants' programming to the 10:00 p.m.-6:00 a.m. safe harbor period, a time when many who would otherwise watch cannot in fact do so. As a result of the district court's decision, cable operators are *required* to block appellants' "indecent" speech entirely from pay-per-view channels except during late night and early morning hours, even though they are free to cablecast identical speech on access channels.

a. The argument that the undisputed *technological* feasibility of full blocking requires rejection of appellants' constitutional challenge to § 505 ignores economics, the fact that appellants have no choice as to how to comply (their speech is subject to the "choice" made by cable operators), and the finding made by the court below that all will comply by time-channeling.

While the court below was certainly correct that "economics alone cannot dictate the result where constitutional rights are at issue" (Motion at 22, *quoting* JS App. 32a), First Amendment analysis looks to the practical impact of governmental measures on speech. Here, that impact is clear from the district court's finding that currently non-compliant cable systems would opt to implement time-channeling as the only reasonable means of compliance. Because time-channeling ensures no risk of violation and avoids substantial capital costs, and because technological approaches cannot be cost-justified (for systems not otherwise engaged in technological rebuilding for other reasons), the finding that "The MSOs that have taken a position on the method by which they would comply with § 505 have all announced that they would adopt time channeling" (JS App. 24a) is beyond challenge. The fact that time-channeling is how cable systems *will* comply renders the means by which they *might* have complied (in another universe where the laws of economics are inapplicable) irrelevant. In short, the issue necessarily is whether the diminution of adult audience that will be caused by time-channeling is permissible, in view of less restrictive alternatives that have been or could be enacted to achieve the same ends.

b. Summary affirmance would, in effect, overrule *DAETC*; it would be a holding by this Court that the government can compel time-channeling regardless of alternative, less-restrictive technical means. That would be not only directly contrary to *DAETC*, but the kind of overreaching holding (as opposed to incremental case-resolving) that the plurality in *DAETC* warned against. 116 S. Ct. at 2385.

That the decision below cannot be squared with *DAETC* is evident from the government's strained attempt to analogize § 508 to § 10(a) (as if restoring to a cable operator the choice of whether or not to cablecast "indecent" speech is analogous to a "choice" between making entirely uneconomic investments in new technology, or blocking certain speech to all households during 2/3 of the broadcast day). Section 505 cannot be characterized as "restoring" to cable operators editorial dis-

cretion that Congress had previously taken away; it is, pure and simple, a content-based restriction on programmer speech ordered by legislative fiat. Unlike § 505, it will certainly result in a direct and substantial diminution of viewership.

Section 10(b), which this Court struck down in *DAETC*, is the closer precedent, and the government gives it only cursory analysis in the Motion (at 19-20). Focussing only on the marginal differences between § 10(b) and § 505 – *e.g.* the 30 day waiting period and written request requirements of § 10(b) – the government ignores the marked similarities between the two provisions that mandate the same result: namely that both measures interfere with the exchange of speech between willing speakers and willing listeners in the purported service of protecting children, without any proof that less restrictive and easily practical measures would not suffice.[1]

The Motion offers no answers to the four questions concerning less restrictive alternatives and necessity posed by the *DAETC* plurality, which are equally pertinent to § 505. *See* Spice JS at 18. Just as the government's lack of answers to those questions dictated striking down § 10(b) in *DAETC*, so too it dictates denial of the motion to affirm. Here, as in *DAETC*, there is no basis in the record for concluding that the challenged restrictions "are a narrowly, or reasonably, tailored effort to protect children." Rather, § 505 is overly restrictive, "sacrificing" important First Amendment interests for too "speculative a gain." *DAETC*, 116 S. Ct. at 2394.

3. The attempt to defend the decision below as an appropriate application of strict scrutiny is rife with error, and does not successfully respond to the errors identified by appellants.

Most importantly, it does not follow, from the fact that time-channeling was upheld as a basis for adverse administra-

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[1] The contention (at 20 n.10) that § 505, unlike § 10(b), "is not aimed at the communication between the programmer and the intended viewer" is inexplicable, given Congress's express provision for compliance through time channeling.

tive action on a broadcaster in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), that it is sufficiently narrowly-tailored to pass scrutiny here. Time-channeling passed constitutional muster in *Pacifica* precisely because it was, as the government here concedes, "the *only* option available" for keeping the offending broadcast from being heard by minors. Motion at 23.

But what is permissible regulation for one medium is not necessarily permissible for another, when differences in technology, and the absence of a scarcity rationale, present a variety of less restrictive means of protecting children that were unavailable in the broadcast context.

It is one thing for the Court to conclude in 1976 that time-channeling was the only way to sufficiently reduce the chances of children hearing George Carlin's "Seven Dirty Words"; there was no way to enable parents from having particular stations blocked from their car or home radios. But cable technology today offers a variety of means for selective, home-by-home protection of children where desired. A single cable television channel, *e.g.*, Spice or HBO carrying Beverly Hills Cop II (which contains a profane word on average every 30 seconds (*see* Playboy Br. at 9)), can be blocked from a single television set through the use of a negative trap, a lockbox or the V-chip. Those options therefore constitute less-restrictive alternatives that render time-channeling insufficiently narrowly-tailored to pass constitutional muster.

The argument for affirmance rests on Senator Feinstein's argument, adopted by the court below and urged by the government here, that the available parental control devices – *e.g.*, negative traps, lockboxes and V-chips – do not "go[] far enough . . . [because they] put the burden of action on the subscriber." Motion at 6, *quoting* 141 *Cong. Rec.* S8167 (daily ed. June 12, 1995). *DAETC* rejected that very argument, however, for the good reasons that (a) it is unsupported by any evidence whatever, and (b) it takes insufficient account of the First Amendment interests of adults, as recognized and found decisive in such cases as *Sable Commun. of Cal., Inc. v. FCC*, 492

U.S. 115, 126 (1989); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73-74 (1983); and *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

The holding that parental control devices such as the blocking-on-request mandated by § 504 are insufficient and that governmental, not parental, control is required to prevent inadvertent exposure of minors to adult programming is not supported by any evidence, much less substantial evidence, and is contrary to First Amendment jurisprudence in three fundamental respects.

First, holding less restrictive means inadequate on this record switches the burden of proof with respect to the narrow-tailoring prong of the strict scrutiny inquiry from the government to the challengers of laws imposing content-based restrictions on protected speech. But it is the government's burden to prove that the means chosen are both necessary and the least restrictive means that could have been chosen to advance compelling interests. Spice JS at 20-23.

Second, doing so also imposes an impossible evidentiary burden of proving that less-restrictive alternatives – including ones enacted at the same moment as the challenged statute – will in practice achieve the same level of results in preventing the unwanted exposure as the more-restrictive statute under challenge. Obviously, such empirical proof cannot be required only weeks after one less-restrictive alternative, § 504, was enacted, and two years before another alternative, the V-chip, was to take effect. *See* Spice JS at 21-22.

Third, out of a desire to protect "children [who] watch television in the homes of their friends as well as in their own homes," Spice JS 35a, the decision below adopts a rationale that carries censorship far beyond the 1/3 of American homes with children, and imposes it to suppress the dissemination of protected speech to adults to whom the rationale does not apply, for 2/3 of each day notwithstanding the availability of less restrictive means for protecting children. This Court has consistently rejected that approach for other media, and for the good reason that it is directly contrary to the *Butler* principle. By that logic, *Butler*, *Sable*, *Bolger*, and *DAETC* were

all wrongly decided, and classics like *Ulysses* or *Lady Chatterly's Lover* could be barred from open shelves at libraries or bookstores because adults who permit such matter in their homes may inadvertently expose their children's friends to material that would not be permitted in the friends' homes.

The First Amendment does not direct courts to "balance" between free speech, on the one hand, and efforts to serve governmental interests, on the other. The command that "Congress pass no law" renders content-based laws presumptively invalid, and if content-based legislation is permissible at all, *see Simon & Schuster v. Members of the New York State Crime Victims Board*, 502 U.S. 105, 128 (Kennedy, J., concurring), it is only under the narrow circumstances permitted by strict scrutiny. Inescapably, if freedom of speech for adults is to be preserved, some adults may inappropriately within their own homes expose neighbors' children to materials that would not be permitted in the neighbors' homes. But the First Amendment does not contemplate banning sales of *Playboy* magazine altogether, or for 2/3 of every day, because some adult might leave it where a visiting child might see it. The distribution via cable of Playboy or Spice is no different, especially where parents may obtain, promptly and without cost, full blocking by a simple telephonic request for it.

The fact that many cable systems – because of technological choices dictated by other factors and made over decades – are presently incapable of fully blocking audio bleed at the system's head-end cannot justify barring protected speech to adults for 16 hours a day merely because it enters the home via cable. Such a restriction cannot be held necessary, or narrowly tailored, when here (as in *DAETC*) blocking-on request, perhaps joined to informational requirements, can fully block such signals from any home seeking such protection.

Nor, finally, is any different result dictated by the anecdotal evidence cited in the Motion at 5-6. In each case, as previously demonstrated, blocking was immediately provided if sought. Spice JS at 17 n. 16; Playboy Br. Opposing Motion at 7 n.9. Nor do those anecdotes – virtually the whole extent of factual

support for § 505 available to the government or produced at trial, and a shadow of the records compiled in other comparable cases (such as *DAETC*, or the dial-a-porn cases) – amount to a showing of necessity sufficient to uphold § 505. Even now, nearly a full year after the complaints were filed, with § 505 never having gone into effect, the government is apparently unaware (as are we) of a single newspaper or television report, or academic or other study, pointing to "harm" warranting some governmental response more restrictive than that provided by § 504's blocking-on-request provisions. Here, as last year when the Court reversed the D.C. Circuit and upheld § 10(c) of the 1992 Cable Act, "these few examples do not necessarily indicate a significant nationwide pattern" warranting a substantial incursion on first amendment interests. *DAETC*, 116 S.Ct. at 2396-97.

4. Notwithstanding argument to the contrary (Motion at 24-25), *DAETC* does not support dismissing appellants' equal protection challenge to § 505. Although noting that "Congress need not deal with every problem at once" in the course of analyzing the restrictions on indecent programming carried on leased- and public-access channels contained in § 10 of the 1992 Cable Act, the plurality opinion did so to support the conclusion that enactment of less-restrictive alternative means of preventing the targeted harm (namely the lockbox provision of the Cable Communications Policy Act of 1984 and the CDA's provisions) evidenced that the more restrictive statute is not essential or narrowly tailored. 116 S. Ct. at 2393.

The *DAETC* passage relevant to this issue is not the one relied on by the government, but the passage considering the impact the enactment of § 504 (requiring blocking-on-request) and § 551 (requiring the V-Chip) on the constitutional review of § 10(b)'s blocking requirement:

> we can take Congress' different, and significantly less restrictive, treatment of a highly similar problem at least as some indication that more restrictive means are not "essential" (or will not prove very helpful). *Cf. Boos v. Barry*, 485 U.S. 312, 329 (1988)

> (existence of a less restrictive statute suggested that a challenged ordinance, aimed at the same problem, was overly restrictive).

116 St. Ct. at 2393.[2]

Reliance on a false arithmetic syllogism (Motion at 24) is insufficient to support the decision below, particularly where the government failed to disprove what seems obvious – namely, that far more "indecent" speech is viewed or heard on mainstream channels than on the zoned-to-the-edge-of-the-list pay-per-view channels covered by § 505. *Compare* Spice JS at 28 *with* Motion at 24-25. Laws distinguishing among speakers – and the sponsoring Senators targeted Spice and Playboy by name – cannot be justified by the one-step-at-a-time rationale that justifies such distinctions in cases of economic regulation. *See* Spice JS at 26-27.

CONCLUSION

The Court should deny the motion to affirm, note probable jurisdiction, and set the case set for plenary review.

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[2] Reliance on similar dicta from *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 434 (1993), is equally misplaced. Not only was *Edge Broadcasting* a commercial speech case, but citing it for validating a restriction on speech where other, less speech-restricting means are available, fails to take account of *44 Liquormart, Inc. v. Rhode Island*, 116 S.Ct. 1495 (1996).

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